Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

| SALIM AHMED HAMDAN,<br>PETITIONER,<br><br>V.<br><br>ROBERT GATES, ET AL.,<br>RESPONDENTS | OMAR KHADR,<br>PETITIONER,<br><br>V.<br><br>GEORGE W. BUSH, ET AL.<br>RESPONDENTS |
|---|---|

***On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court Of Appeals For The District Of Columbia Circuit***

## PETITION FOR WRIT OF CERTIORARI AND WRIT OF CERTIORARI BEFORE JUDGMENT

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## QUESTIONS PRESENTED

This case presents a question that is also presented by petitions for certiorari anticipated in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir., Feb. 20, 2007) and *Al Odah v. United States*, No. 05-5063 (D.C. Cir., Feb. 20, 2007):

1. Do individuals detained as alleged enemy combatants at the Guantanamo Bay Naval Base in Cuba have access to habeas corpus under the Constitution or by statute?

In addition, this case presents two further questions, which make this case a logical and necessary companion to the *Boumediene* and *Al Odah* petitions:

2. Is the Military Commissions Act of 2006 ("MCA"), which purports to strip federal courts of habeas jurisdiction with respect to Guantanamo Bay detainees, unconstitutional because it violates separation of powers, the Bill of Attainder Clause, and Equal Protection guarantees?

3. Even if the MCA validly withdraws habeas jurisdiction over petitions filed by individuals detained as alleged enemy combatants, are the petitioners in this case who are facing criminal *prosecution* before military tribunals – and sentences of life imprisonment and death – nevertheless protected by fundamental rights secured by the Constitution, including the right to challenge the jurisdiction of such a tribunal via the writ of habeas corpus?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

Petitioner Salim Ahmed Hamdan is a citizen of Yemen who is currently detained at the Guantanamo Bay Naval Station.

Petitioner Omar Khadr is a citizen of Canada who is currently detained at the Guantanamo Bay Naval Station.

The Respondents in the United States Court of Appeals for the District of Columbia Circuit are Donald H. Rumsfeld, former United States Secretary of Defense; John D. Altenburg, Jr., former Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, former Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; Colonel Nelson J. Cannon, former Commander of Camp Delta; and George W. Bush, President of the United States.

The parties before the Court have changed due to a series of personnel adjustments. Donald H. Rumsfeld, the Secretary of Defense, left office on December 15, 2006, and his successor, Robert M. Gates, took office on December 18, 2006. John D. Altenburg, Jr., the Appointing Authority for Military Commissions, left office on November 10, 2006, and his successor, Susan J. Crawford, took office as Convening Authority for Military Commissions on February 7, 2007. Brigadier General Jay Hood, the Commander Joint Task Force, Guantanamo, transferred command to Rear Admiral Harry B. Harris on March 31, 2006. Colonel Nelson has been replaced by Dennis Wade.

Pursuant to Rule 29.6, Petitioners state that no parties are corporations.

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Salim Ahmed Hamdan and Omar Khadr petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the district court in Petitioner Hamdan's case with respect to which a writ of certiorari before judgment is sought (App. A, *infra*) is reported at 464 F. Supp. 2d 9 (2006). The opinion of the circuit court in the case in which Petitioner Khadr was a party (App. G, *infra*) is not yet reported but available at 2007 WL 506581.

## JURISDICTION

In petitioner Hamdan's case, the judgment of the district court was entered on December 13, 2006. *See* App. A, *infra*, at 1a. Petitioner timely filed his notice of appeal (App. D, *infra*) on February 5, 2007. The case was docketed in the court of appeals on February 6, 2007, as No. 07-5042. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

In petitioner Khadr's case, the judgment of the court of appeals was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Under Sup. Ct. R. 12.4, "[w]hen two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices." As petitioners have confirmed with the Clerk's Office of the Court, this Petition satisfies this Rule because both Petitioners seek a writ of certiorari to the D.C. Circuit. Their cases are presented together in a single Petition because both face charges before military commissions at Guantanamo Bay.

## RELEVANT LEGAL PROVISIONS

The relevant legal provisions are reproduced in Appendix C.

## STATEMENT

Respondents have detained Petitioners at Guantanamo Bay, deemed them "enemy combatants," charged Hamdan with "Conspiracy" and "Providing Material Support for Terrorism,"

charged Khadr with those crimes in addition to others, and plan to try them before military commissions. On a previous appeal, while Hamdan faced essentially the same "Conspiracy" charge, this Court held that his claims under the Geneva Conventions and Uniform Code of Military Justice ("UCMJ") were meritorious. However, upon remand, the district court held that Congress has now stripped it of jurisdiction to consider Hamdan's habeas petition. The circuit court issued a similar ruling dismissing Khadr's habeas petition.

1.a. *Petitioner Hamdan*: Over five years ago, indigenous forces seized Hamdan in Afghanistan while he was attempting to evacuate his family to Yemen, his native land. He was turned over to U.S. military personnel in exchange for a bounty, interrogated for months, and then brought to Guantanamo Bay. Many reports of mistreatment have emerged from Guantanamo. Detainees have been beaten, deprived of sleep for weeks, and subjected to sexual humiliation and religious degradation.[1]

b. Over a year after Hamdan was transferred to Guantanamo, in July 2003, the President asserted that Petitioner was subject to his November 13, 2001 Military Order. He was placed in solitary confinement, and military defense counsel was appointed for the purpose of negotiating a guilty plea. The demand by Hamdan that charges be preferred and a speedy trial held under the UCMJ was rejected. He remained in solitary confinement for ten months, until October 2004.

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[1] United Nations investigators issued a report in February 2006, concluding that interrogation and detention practices at Guantanamo amounted to torture and calling for the camp's closure. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶¶ 53, 86, 96, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006). More than 25 detainees have attempted suicide, and 3 detainees hanged themselves in their cells in June 2006. James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. Times, June 11, 2006, at 1. In one regularly utilized procedure, detainees were forced to strip to their underwear in rooms maintained at an excessively cold temperature, shackled to floor bolts, and bombarded with loud rap music and strobe lights. Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004, at 1. Another FBI report revealed that soldiers and interrogators had kicked the Koran, stood on it, and wrapped duct tape around a bearded detainee's head when he quoted from the Koran. Dan Eggen, *FBI Reports Duct-Taping, "Baptizing" at Guantanamo*, Wash. Post, Jan. 3, 2007, at A1.

c. Meanwhile, in April 2004, Hamdan's military counsel filed a petition for a writ of habeas corpus in federal district court. In July 2004, Hamdan was finally charged with a single count of conspiracy. Ultimately, in June 2006, this Court ruled that Petitioner could not be tried by military commission. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This Court held that the Geneva Conventions applied because the jurisdictional statute for military commissions incorporated the laws of war, that Common Article 3 applied in the armed conflict in which Hamdan was captured, and that it entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795. A plurality of the Court also held that conspiracy is not a cognizable offense under the laws of war. *Id.* at 2775-86.

d. On remand from this Court, the district court interpreted § 7 of the Military Commissions Act of 2006 ("MCA") to require dismissal of Hamdan's habeas petition. The President signed the MCA into law on October 17, 2006. Pub. L. No. 109-366, 120 Stat. 2600. Under the MCA, alien detainees designated as "unlawful enemy combatants" by Combatant Status Review Tribunals ("CSRTs") are subject to trial by military commission. MCA § 3(a) (adding 10 U.S.C. § 948(c),(d)). CSRT determinations are "dispositive for purposes of jurisdiction for trial by military commission." *Id.*

In addition, the MCA purports to strip jurisdiction over any habeas action brought by an alien "determined by the United States to have been properly detained as an enemy combatant or...awaiting such determination." MCA § 7(a). Nor may the courts hear "any other action against the United States or its agents relating to any aspect of the detention, transfer, trial, or conditions of confinement" of such an alien, except for a limited review allowed under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) ("DTA"). *Id.* A separate MCA provision strips jurisdiction over claims relating to "the prosecution, trial, or judgment" of a commission. MCA § 3(a) (adding 10 U.S.C. § 950j(b)).

The MCA and DTA allow for only a narrow, *post hoc* review of a subset of detainee claims before the D.C. Circuit. Only after military commission proceedings are finalized (with

no timetable for such finalization) may the D.C. Circuit consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, or consistent with federal law and the Constitution, to the extent that they apply. MCA § 3(a) (adding 10 U.S.C. § 950(g)). There is no provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.* In like manner, the D.C. Circuit may hear claims filed after a final decision of a CSRT. The scope of review is similarly restricted, but the court may review whether the decision was "supported by a preponderance of the evidence." MCA § 7(a); DTA § 1005(e).

The district court on remand in this case first held that the MCA removed statutory habeas jurisdiction. While noting that "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction, *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), the court nevertheless rejected Petitioner's argument that § 7(b) of the MCA does not clearly apply retroactively to pending habeas petitions. App. 4a-6a.

The district court next held that the MCA did not suspend the constitutional right to habeas. Because the conditions for suspension did not exist and Congress "made no findings of the predicate conditions," it found no suspension. *Id.* 11a-12a.

Nevertheless, the district court held that the general availability of constitutional (as opposed to statutory) habeas was of no help to Hamdan because, as an alien enemy, he was not entitled to seek the writ. Despite this Court's statement in *Rasul v. Bush*, 542 U.S. 466, 481 (2004), that its interpretation of the habeas statute was "consistent with the historical reach of the writ of habeas corpus," the district court dismissed as dicta *Rasul*'s discussion of habeas petitions brought by aliens detained in territory under the jurisdiction and control of the Executive in England and the United States. App. 12a-13a.

Rather than following *Rasul*, the district court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where this Court held that German citizens convicted of war crimes in post-World War II China and imprisoned in Germany had no right to the writ. The district court held that Guantanamo "lies outside the sovereign realm, and only U.S. citizens there may claim entitlement to a *constitutionally* guaranteed writ." App. 16a.

Having decided that it had been "divested of jurisdiction," the court opined that it could not consider Hamdan's remaining constitutional challenges. It thus declined to consider the inadequacy of the MCA's review compared to constitutional habeas review, or Hamdan's contentions that the MCA interferes with the judicial function by nullifying this Court's ruling that the Geneva Conventions apply, and that it violates the Bill of Attainder and Equal Protection Clauses. App. 16a.

e. On February 2, 2007, charges of "Conspiracy," and "Providing Material Support for Terrorism" were sworn against Hamdan pursuant to the MCA. App. 32a.

2.a. *Petitioner Khadr:* In July 2002, U.S. forces seized Petitioner Omar Khadr in Afghanistan, when he was fifteen years old. After detaining and interrogating him for several months, U.S. military forces transferred him to Guantanamo Bay, where he remains to this day. In July 2004, following this Court's decision in *Rasul*, Khadr filed a habeas petition. His case was transferred to Judge Joyce Hens Green for coordination with other Guantanamo cases. On January 31, 2005, Judge Green denied the Government's motion to dismiss these cases, and held that the petitioners, including Khadr, were protected by the Constitution. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). In a second, related case, Judge Richard Leon granted the government's motion to dismiss. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Both cases were consolidated before the D.C. Circuit.

b. In July 2005, over three years after Khadr was taken into U.S. custody, the President determined that he was subject to the November 13, 2001 Military Order. On the afternoon of November 7, 2005, the same day that this Court granted certiorari in *Hamdan*, the government announced charges against Khadr. His habeas petition was then amended to reflect his changed circumstances and to contest his detention pending trial by military commission. Commission proceedings against Khadr began in January 2006, but were terminated upon this Court's decision in *Hamdan*.

c. On February 2, 2007, new charges were sworn against Khadr. These include charges of "Conspiracy" and "Providing

Material Support for Terrorism," identical to those sworn against Hamdan. App. 103a.

d. On February 20, 2007, the D.C. Circuit issued its decision in the consolidated appeals from Judges Green and Leon, dismissing the cases for lack of jurisdiction in light of § 7 of the MCA. App. 71a-72a. The court held that the MCA stripped the federal courts of jurisdiction over the detainees' habeas actions. *Id.* The court assumed that the Suspension Clause only protects the writ as it existed in 1789, and found no Suspension Clause violation because the writ in that era would not have been available to persons held "at an overseas military base" such as Guantanamo. App. 62a-64a. It further held that the "Constitution does not confer rights on aliens without property or presence within the United States." App. 66a.

e. The claims presented by the *Boumediene* and *Al-Odah* petitioners, and the circuit court's decision, do not include or address pre-trial challenges to the jurisdiction of a military commission, which is a central feature of this petition.[2] *Boumediene* and *Al-Odah* do not implicate the MCA's military commission provisions, as almost all of those detainees, unlike Hamdan, are not facing charges—a distinction that they relied on to assert that they stand in a more favorable jurisdictional position than Hamdan.[3] Moreover, the detainees in those cases did not assert—and the circuit court did not address—the separation of powers, Bill of Attainder, or Equal Protection violations raised by Hamdan below. Recognizing that Hamdan's Petition involves a challenge to the jurisdiction of the commissions not present in *Boumediene* and *Al Odah*, Khadr –

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[2] Indeed, in discussing the inadequacies of the CSRTs as compared to habeas review, the dissent in *Boumediene* drew a distinction between the detainees in that case and individuals (such as Hamdan and Khadr) who are "facing an imminent trial." App. 91a & n.9 (Rogers, J., dissenting).

[3] *Al Odah* petitioner David Hicks has also been charged under the MCA, but the *Al Odah* and *Boumediene* appeals only challenged the legitimacy of the CSRTs as a basis for non-commission petitioners' continuing detention, not the jurisdiction of a military commission. The circuit court's opinion does not address the effect of these petitioners' status as pre-commission detainees, nor does the dissent.

Moreover, counsel for Hicks has represented that he strongly supports the granting of certiorari in the Khadr and Hamdan cases.

whose case was consolidated with *Al Odah* before the circuit court – joins in this Petition pursuant to Sup. Ct. R. 12.4.

## REASONS FOR GRANTING THE PETITION

### I. The Questions Presented Are Exceptionally Important and Ripe for Review, and the Case Is a Necessary Counterpart to Others Likely to Be Reviewed.

Certiorari before judgment may be granted when a "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. *See* U.S. Pet. for Cert. Before J., *United States v. Fanfan*, No. 04-105, *cert. granted*, 125 S. Ct. 12 (2004). This case satisfies that standard.

A. First, this Petition presents the important question of whether the courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by detainees at Guantanamo Bay. The scope of habeas jurisdiction is a matter of profound national and international importance. Habeas review is crucial to our carefully attuned separation of powers. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (noting the "necessary role" of the Great Writ in "maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions"). The writ's importance is at its apogee when it is the only means available to stop an illegal trial where a man's life is at stake.

Access to the federal courts via habeas is determinative of a further essential question: whether the political branches can circumvent the Constitution and decisions of this Court to institute criminal prosecutions before military tribunals, summary proceedings regarded with the utmost suspicion by our Founders. *Hamdan*, 126 S. Ct. at 2759 ("trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure"); *id.* at 2800 (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order."); *Loving v. United States*, 517 U.S. 748, 760 (1996) ("the Framers harbored a deep distrust of executive military power and military tribunals"). As the War on Terror

enters its sixth year, this Court's guidance is needed on whether the judiciary can be summarily removed from its traditional role in safeguarding liberty and preserving the balance of power.

B. Second, this case serves as a necessary counterpart to petitions for certiorari that will soon be filed in the recently decided *Al Odah* and *Boumediene* cases. Each case challenges in some form the constitutionality of the MCA and the scope of constitutional protections at Guantanamo. However, standing alone, *Al Odah* and *Boumediene* do not provide this Court with the opportunity to evaluate these claims fully.

The petitioners in *Al Odah* and *Boumediene* are challenging the adequacy of the CSRTs, contending that they failed to provide the process due to anyone detained indefinitely without charge. Those cases have focused on the CSRTs and the rights of persons who do not face commissions. *See Boumediene*, App. 53a-54a (describing the issue presented as whether habeas extends to aliens "detained as enemy combatants").[4] By contrast, Hamdan commenced this action primarily as a jurisdictional challenge to a military commission, a challenge he now renews in light of the charges preferred against him under the MCA. Khadr is also facing charges before a military commission – indeed, potentially capital charges –and joins Hamdan in this challenge. Thus, unlike *Al Odah* and *Boumediene*, this case presents the question of whether the Great Writ still serves as a vehicle to challenge, on a pre-trial basis, the jurisdiction and legitimacy of a criminal tribunal, as this Court held it did just a few months ago in this very case.[5]

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[4] Several decisions distinguish between those facing commissions and CSRTs. *E.g.*, *supra* note 3; *Hamdan*, 126 S. Ct. at 2798. ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005), *overruled by Boumediene*, *supra*.

[5] Because detention raises different concerns than punishment, consideration of Petitioners' case is necessary to review fully the constitutionality of the MCA. *E.g.*, *Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); Amicus Br. of the Military Attorneys Assigned to the Def. in the Office of Military

This case differs in the additional respect that Hamdan and Khadr face prosecution in a process that permits the introduction of testimony extracted through coercion, tries them on alleged offenses defined *ex post facto* (one of which a plurality of this Court has already stated does not violate the laws of war), and strips them of the right to invoke treaty-based defenses that this Court has already ruled apply. *Al Odah* and *Boumediene* do not implicate the Ex Post Facto Clause, nor do they test whether a decision of this Court affording Petitioners treaty-based rights can be side-stepped by a subsequent jurisdictional statute, one which, with respect to Hamdan at least, essentially nullifies the law of the case.

As set forth below, Petitioners contend that such a maneuver impermissibly interferes with the judicial function in contravention of *United States v. Klein*, 80 U.S. 128 (1871).

In addition, the *Al Odah* and *Boumediene* petitioners, unlike Hamdan below, do not argue that the MCA offends Bill of Attainder and Equal Protection guarantees. Consideration of this case is therefore necessary to review fully the MCA's constitutionality. *Cf. Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (certiorari before judgment granted to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances").[6]

This Court has often granted certiorari before judgment in order to bring before it a logical companion to another important case in which certiorari has been granted. For

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Commissions, *Al Odah*, No. 03-343, at 5-7.

[6] Simultaneous consideration is necessary for the additional reason that the litigating positions of the *Al Odah* and *Boumediene* detainees and Petitioners are at times adverse. The former have argued that those facing military commissions have a weaker claim for habeas review than those who are merely detained. *See, e.g.*, Supp. Br. of Pet'rs Boumediene, et al., and Khalid, at 18, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. Nov. 1, 2006) ("The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge."); Guantanamo Detainees' Supp. Brief, at 13, *Al Odah v. United States*, No. 05-5064 (D.C. Cir., Nov. 1, 2006). By contrast, Petitioners contend that those facing prosecution are protected by the Great Writ in full measure. *See* Br. for Pet. at 8, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184).

example, in *United States v. Fanfan, rep. sub nom. United States v. Booker*, 543 U.S. 220 (2005), the Court granted certiorari before judgment to hear the case with *Booker*, since both presented the issue of sentencing in federal courts not "based solely upon the guilty verdict." *Id.* at 229. Likewise, the Court granted certiorari before judgment in *Gratz*, 539 U.S. at 259-60, to consider the case alongside *Grutter v. Bollinger*, 539 U.S. 306 (2003), since both involved challenges to affirmative action policies at the University of Michigan. These recent precedents reflect this Court's long history of granting certiorari before judgment to consider similar cases simultaneously.[7]

C. Third, this Court has also granted certiorari before judgment when questions of great importance required prompt resolution. This is such a case, as demonstrated by the actions of this Court in the past. *See, e.g., Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment in a case involving a military commission); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari before judgment to determine whether the Constitution applies extraterritorially to restrain military trials); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (same); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment in a case impacting sensitive foreign policy matters); *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) (same); *The Three Friends*, 166 U.S. 1 (1897) (same); *United States v. Nixon*, 418 U.S. 683, 686 (1974) (certiorari before judgment in a case raising separation of powers questions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

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[7] *E.g., New Haven Inclusion Cases*, 399 U.S. 392 (1970) (consolidated litigation); *United States v. Thomas*, 362 U.S. 58 (1960) (considered with *United States v. Raines*, 362 U.S. 17 (1960)); *Taylor v. McElroy*, 360 U.S. 709 (1959) (considered with *Greene v. McElroy*, 360 U.S. 474 (1959)); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (considered with *Reid v. Covert*, 351 U.S. 487 (1956)); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (considered with *Brown v. Bd. of Educ.*, 344 U.S. 1 (1952)); *Porter v. Dicken*, 328 U.S. 252 (1946) (considered with *Porter v. Lee*, 328 U.S. 246 (1946)); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (considered with *United States v. Butler*, 297 U.S. 1 (1936)); *see also* Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 297 (1986).

D. This Court has also granted certiorari before judgment in cases that, like Hamdan's, were returning to the Court a second time for clarification of the scope or meaning of its prior ruling.[8] In this case, certiorari before judgment is necessary to ensure that any trials that do occur comport with the rule of law and with "judicial guarantees which are recognized as indispensable by civilized peoples." This Court should resolve—for the benefit of Respondents as well as Petitioners—whether the United States is bound by the Constitution in the criminal trials it is about to initiate, or instead can proceed in defiance of the judgment of our Founders, treaty obligations, rulings of this Court, and international law to maintain "law-free zones" in territories long subject to exclusive U.S. control. To decline to grant certiorari in this case as a necessary companion to *Al Odah* and *Boumediene* would allow the Government to initiate criminal proceedings under a cloud of uncertainty and potential illegitimacy, to the great detriment of our standing in the world as a country committed to the rule of law.[9]

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[8] *See, e.g., Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) (prior cases: 329 U.S. 708 (1946) and 328 U.S. 495 (1946)); *Piedmont & N. Ry. v. ICC*, 286 U.S. 299 (1932) (prior case: 280 U.S. 469 (1930)); *Fetters v. United States*, 283 U.S. 812 (1931) (prior case: *Mathues v. United States*, 282 U.S. 802 (1930)); *St. Louis, Kansas City R.R. v. Wabash R.R.*, 217 U.S. 247 (1910) (prior case: *Joy v. St. Louis*, 138 U.S. 1 (1891)).

Last term, this Court and the parties before it dedicated substantial attention to, without finally resolving, many of the same questions presented in this Petition: Petitioner's right to seek the Writ and the constitutional validity of an attempt to suspend it. *See Petrs. Mo. Expedite*, at 8.

[9] "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772. Consider, for example, the circumstances Petitioners face. They have been held in U.S. custody for approximately five years, including extended periods in solitary confinement. It is impossible for them to plan for their trials, as they do not even know if due process and other fundamental rights secured by the Constitution will govern their trials and punishment. Such uncertainty, in turn, makes a plea nearly impossible. Ordinary criminal trials apply fixed rules in advance. Here, everything about the trials, including the most basic question of all—does the Constitution apply to them—are in doubt.

## II. The Courts Below Erred in Creating a Legal Black Hole at Guantanamo Exempt from the Great Writ.

Regardless of whether the MCA strips the federal courts of statutory jurisdiction, Petitioners' claims are cognizable under the writ of habeas corpus preserved by the Constitution. The Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2. This Court should make clear that, contrary to the rulings of the district and circuit courts, the detention and trial of alleged enemies held for years at Guantanamo is reviewable under the Great Writ, the "highest safeguard of liberty" in our system. *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

"Habeas corpus is...a writ antecedent to statute,...throwing its roots deep into the genius of our common law....The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul*, 542 U.S. at 473-74. The Founders ensured that the availability of the writ was not dependent upon executive or legislative grace. *St. Cyr*, 533 U.S. at 304 n.24. Thus, the right to habeas exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strictly limited conditions.

The conclusion that Petitioners have a constitutional right to habeas follows from the history of the writ and this Court's precedents, which establish that (1) their claims fall within the scope of the writ as it existed in 1789, (2) their status as alleged enemy combatants presents no bar, and (3) the right to habeas under the Constitution reaches to Guantanamo Bay.

A. Petitioners' claims falls squarely within the scope of the habeas inquiry historically available under the common law. This Court has recognized that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).[10] *Rasul* applied the pre-MCA habeas statute to

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[10] *Boumediene* "truncated" *St. Cyr*'s analysis by eliminating the key words "at an absolute minimum." App. 82a n.5 (Rogers, J., dissenting). Indeed, several cases look to the writ as it has evolved, not as it existed in

Guantanamo detainees because that construction was consistent with the "historical reach of the writ," which was available even "where ordinary writs did not run [in] all...dominions under the sovereign's control." *Rasul*, 542 U.S. at 481-82. *Rasul*'s understanding was correct; the courts below erred on this point.

The writ has been a vehicle for challenges to executive detention since 1340. William F. Duker, *A Constitutional History of Habeas Corpus* 24 (1980). Indeed, it is in this context that its protections "have been strongest." *St. Cyr*, 533 U.S. at 301; *see also Swain*, 430 U.S. at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963) ("[t]he classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military....").[11]

Moreover, the writ historically has been available to test the detention of alleged enemy aliens and prisoners of war, as illustrated by *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759). In *Schiever*, an English court reviewed the sworn statements supporting the habeas petition of a seaman from a neutral nation

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1789. *E.g.*, *Felker*, 518 U.S. at 663-64 (1996) ("[W]e assume for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 171 (1970)) (noting that "Judge Friendly observed that '[w]hat Congress has given, Congress can *partially* take away,'" an observation "more cautious than the conclusion that Congress may *totally* repeal all post-18th Century developments in this area of the law") (emphasis added by the Court).

[11] *Boumediene's* discussion of English history, App. 63a-65a, rested on treatises that describe efforts by the Earl of Clarendon to evade the writ by sending prisoners overseas. In passages omitted in *Boumediene*, the treatises go on to explain that Parliament put an end to that practice in 1679. 2 Henry Hallam, *The Constitutional History of England* 230-32 (1989) (1827); Duker, *supra*, at 52-58; Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 52 Int'l & Comp. L.Q. 1, 8 (2004) ("In 1679 this loophole was blocked by section 11 of the Habeas Corpus Amendment Act 1679. For more than three centuries such stratagems to evade habeas corpus have been unlawful in England."). The Framers did not incorporate Clarendon's habeas into the Suspension Clause, but rather the more robust writ that emerged by 1679.

(Sweden) deemed a prisoner of war after he was captured aboard a French privateer during the Seven Years' War. *Id.* at 552. This Court in *Rasul* correctly read *Schiever* as proof that suspected enemy aliens can invoke habeas.[12]

Early American courts similarly recognized that habeas extends to enemy aliens. *See, e.g.*, *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813) (considering petition of a British citizen imprisoned during the War of 1812); *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 1813 WL 757 at *1 (La. 1813) (summarizing the district court's decision to release the petitioner on habeas because he had been incorrectly classified as an enemy alien).

Further, Guantanamo clearly falls within the geographic coverage of the common-law writ, which historically had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 n.12 (quoting R. Sharpe, *Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the eighteenth century, habeas extended beyond the Kingdom of England; it was "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758). Lord Mansfield stated there was "no doubt" the writ could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." *King v. Cowle*, 97 Eng. Rep. 587, 598 (K.B. 1759). The writ extended to India well before Britain's 1813 assertion of sovereignty.[13] In short, habeas jurisdiction turns on control, not sovereignty.[14]

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[12] Notwithstanding *Rasul*, the *Hamdan* district court deemed it unclear whether *Schiever* ultimately dismissed the habeas petition on jurisdictional or substantive grounds. App. 12a-13a. But if *Schiever* was jurisdictional, the English court would have simply accepted the Crown's assertion that the prisoner was an enemy alien and dismissed the petition outright. Instead, the court reviewed the evidence presented by the petitioner before concluding that he was lawfully detained. 97 Eng. Rep. at 552. *The Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779), provides another example of a prisoner of war invoking the writ. As in *Schiever*, the court maintained jurisdiction to review the evidence, noting that the prisoners, "upon their own showing, are alien enemies and prisoners of war." *Id.* at 776.

[13] By 1775, judges began to issue common-law habeas writs to British subjects as well as "natives." *E.g.*, N. Hussain, *The Jurisprudence of*

B. The courts below held that Petitioners are not entitled to the constitutionally guaranteed writ based on a misreading of *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), and an erroneous belief that Petitioners' detention outside the "sovereign realm" of the United States mandates dismissal. App. 15a-16a. In fact, as this Court held earlier with respect to the Geneva Conventions, *Eisentrager* "does not control this case." *Hamdan*, 126 S. Ct. at 2794. Rather, it is distinguishable on multiple grounds, including: (1) Petitioners are not nationals of countries at war with the United States; (2) they dispute their status as alleged enemy combatants; (3) the United States exercises exclusive jurisdiction and control at Guantanamo, and (4) in *Eisentrager* this Court *reached the merits* of the habeas petitions, despite language in the opinion that questioned the basis for jurisdiction.[15]

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*Emergency: Colonialism and the Rule of Law* 81 (2003); B.N. Pandey, *The Introduction of English Law into India* 151 (1967). But until the Act of 1813, 53 Geo. 3, c. 155, the Moghul Emperor retained "formal sovereignty," 4 *The Cambridge History of the British Empire* 592, 595 (1929). *See also Boumediene*, App. 83a (Rogers, J., dissenting).

[14] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (writ issued to Channel Islands). *See also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (writ issued to Calais); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same).

[15] *Eisentrager* does not stand for the proposition that courts are closed to those in Petitioners' position. Rather, the petitioners in *Eisentrager* were provided a full hearing, with the Court carefully considering the substance of petitioners' claims before rejecting them *on the merits*. This Court recognized as much last term in *Hamdan*, noting that in *Eisentrager* "[w]e rejected [petitioners' Geneva Convention] claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'" 126 S. Ct. at 2793. While *Eisentrager* did discuss at length whether enemy aliens were afforded access to American courts, it stated that "the doors of our courts have not been summarily closed upon these prisoners" and that it heard and considered "all contentions they have seen fit to advance" before concluding that no basis for

Indeed, in *Rasul*, this Court expressly recognized many of the factual distinctions that render *Eisentrager* inapposite:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression; ...they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

542 U.S. at 476. Under these facts, habeas jurisdiction is proper, as "nothing in *Eisentrager*...categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." *Id.* at 484.[16]

This Court's understanding in *Rasul* and *Hamdan* was correct: *Eisentrager* presented a unique factual situation, and its holding does not govern here. The *Eisentrager* petitioners were German nationals convicted by a military commission in China. The commission was established with the consent of the Chinese Government.[17] Following their convictions, they were

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issuing the writ appeared. 339 U.S. at 780-81. Indeed, *Eisentrager* engaged in precisely the same habeas inquiry into the jurisdiction of the military commission that the Court had previously provided in *Quirin*, *Yamashita*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). That inquiry focused on "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787 (quoting *In re Yamashita*, 327 U.S. 1, 8 (1946)).

[16] The *Hamdan* district court relied on the fact that in *Eisentrager* it was immaterial whether the petitioners were in the service of a German civilian or military institution. But that was because the petitioners were *indisputably German nationals*, 339 U.S. at 765, and that status alone rendered them enemies of the United States as a matter of law, *id.* at 773-75 & n.6. In addition, *Eisentrager* emphasized that rather than simply being citizens of a nation at war with the United States, "these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity." *Id.* at 778. By contrast, Petitioners here are citizens of Yemen and Canada, nations not at war with the United States, and they do not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *See Boumediene*, App. 95a ("These detainees are citizens of friendly nations...[including] Canada [and] Yemen[.]") (Rogers, J., dissenting).

[17] *Eisentrager*, Index to Pleadings, Ex.4- Message of 6 July 1946 to

detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[18] Based on this relatively dense legal landscape, the Government claimed in *Eisentrager* that "[t]he rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country.... They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation.... [Their] legal status does not differ from that of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," not the American Constitution. U.S. Br., *Eisentrager* 1950 WL 78514, at *65-67 (1950) (No. 306).

In contrast, Guantanamo is "territory over which the United States exercises plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. It is "in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring). There is neither shared control by multiple sovereigns, nor an underlying legal framework apart from the Constitution. Guantanamo in 2007 is not remotely analogous to occupied Germany in 1947, and the arguments counseling denial of the writ in *Eisentrager*—unwillingness to interfere with the multiple sovereigns and the textured, distinctive legal system inherent in military occupation—are absent in the unique case of Guantanamo.

Finally, *Eisentrager* predicated the denial of habeas relief on three facts that are missing here: (1) the petitioners there had never been within the habeas jurisdiction of the United States, (2) the Court's previous determination that the World War II military commissions were "lawful tribunal[s]," and (3) the Court's judgment on the merits that the *Eisentrager* petitioners had been charged with a recognized war crime. *Id.* at 786-87.

First, not only are Petitioners within the territorial

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Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[18] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Documents on Germany*, 1944-1970, Comm. on Foreign Relations, 92nd Cong., (Comm. Print 1971), at 150-51.

jurisdiction of the United States, for years the Government held them within the statutory jurisdiction of the federal *courts*. *Compare Eisentrager*, 339 U.S. at 768 (emphasizing that the "alien enemy ...in no stage of his captivity[] has been within its territorial jurisdiction"), *with Rasul*, 542 U.S. at 475-84 (holding that habeas jurisdiction extended to Guantanamo). The Administration continued to hold Petitioners at Guantanamo for years after *Rasul*. Textually, there was nothing to "suspen[d]" in *Eisentrager*, as the Court found that the writ had never protected the petitioners. Here, by contrast, this Court has already found that the writ protects the very subject of this Petition.

Second, *Eisentrager* was decided after *Quirin* and *Yamashita*, where this Court had already upheld the legitimacy of the World War II military commissions. 393 U.S. at 786 ("[W]e have held in the *Quirin* and *Yamashita* cases...that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). The petitioners in *Eisentrager* thus had no claim that the commission itself was illegitimate. Here, the prior military commission established to try Hamdan (which is identical in most material respects to the commission Petitioners face now) was deemed unlawful by this Court less than a year ago. *Rasul* observed that the *Eisentrager* petitioners had "been afforded access to [a] tribunal," a factor that weighed against the extension of habeas in that case. *Rasul*, 542 U.S. at 476. It cannot possibly be that access to an unprecedented, unlawful tribunal satisfies this criterion.

Third, the *Eisentrager* Court recognized that—as in *Quirin* and *Yamashita*—it had jurisdiction to consider whether the petitioners had been charged with an offense cognizable as a war crime. 339 U.S. at 787 (charges had "a basis in conventional and long-established law"). That is not the case here; a plurality of this Court determined that the previous "conspiracy" charge was *not* a violation of the laws of war. *Hamdan*, 126 S. Ct. at 2785-86. Reliance on *Eisentrager* to deny habeas review is misplaced where no court has had the opportunity to pass on that fundamental jurisdictional question.

C. The district court separately invoked *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that Hamdan cannot assert constitutional rights because he is a

non-national with an insubstantial connection with the United States. App. 15a. But the question in this case—whether federal courts retain jurisdiction over constitutional habeas corpus—is entirely independent from the question in *Verdugo-Urquidez*: the application of Fourth Amendment rights abroad. Like other structural protections, the Suspension Clause is not limited to a particular class of individuals, but rather constrains the power of Congress to act. *Cf. Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (emphasizing that it is unnecessary to determine whether the Constitution applies extraterritorially because the Attainder Clause "go[es] to the very root of the power of Congress to act at all"); *see also Boumediene*, App. 77a (both the Suspension Clause and Attainder Clause are "limitations on Congress's powers") (Rogers, J., dissenting).

*Hamdan* relied on such a conclusion, for it held that the President's establishment of a military commission violated the UCMJ and the Geneva Conventions. Implicit in that ruling was the principle that a Guantanamo detainee *can* invoke constitutional restraints—in that case separation of powers—to contest government action. In other words, if the Constitution did not "protect" Guantanamo detainees, then there would have been nothing barring the President from defying the UCMJ and the Geneva Conventions in trying Hamdan. Indeed, in briefing to this Court the Government argued that *Eisentrager* barred Hamdan's merits claims precisely because the Constitution's structural protections did not extend to Hamdan.[19] Yet the Court nonetheless explicitly relied on separation of powers to rule in Hamdan's favor. 126 S. Ct. at 2774 n.23 ("[T]he President ...may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

Furthermore, *Verdugo-Urquidez* does not purport to hold that the Constitution never applies to non-nationals located overseas. Although the Court held in that case that the Fourth

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[19] Specifically, the Government stated that "Petitioner's argument...is predicated on the proposition that the Constitution places structural limits on the President's authority to convene military commissions... As an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of our Constitution." U.S. Merits Br., *Hamdan*, at 43.

Amendment did not apply in those circumstances, it regarded as established that certain "'fundamental' constitutional rights are guaranteed to inhabitants of...territories" under the control of the United States. 494 U.S. at 268. The Court emphasized the limited and highly contextual nature of its decision, which carefully examined the history of the Fourth Amendment. *See id.* The degree to which the Constitution applies extraterritorially is complex and dependent on many factors, including the particular provision, the status of the individual claiming its protection, and the territory in question. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the question is not whether the Constitution applies, as it must, but "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations").[20]

Crucially, *Rasul* has already suggested that the "fundamental rights" reasoning of *Verdugo* applies to Guantanamo. 542 U.S. at 484 n.15; *id.* at 487 (Kennedy, J., concurring) ("the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it"). Yet neither court below gave weight to this portion of *Rasul*, and instead left detainees who are under the government's complete control entirely unprotected by the Constitution.

Finally, the issue of whether the Constitution protects Petitioners is crucial not simply for habeas corpus, but for the more fundamental matter of whether the Constitution constrains military commissions at all. Trying Petitioners on charges of "Conspiracy" and "Material Support"—newly minted offenses in the MCA—offends the Ex Post Facto Clause. A plurality of this Court already held that conspiracy is not a violation of the laws of war and "[b]ecause [that] charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan." 126 S. Ct. at 2785. Going forward with a trial under

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[20] *Verdugo-Urquidez*, moreover, reserved the question whether a person whose "lawful but involuntary" stay was prolonged "by a prison sentence" might be entitled to constitutional protections. 494 U.S. at 271-72.

these conditions will not provide a better record for post-trial review by an Article III court, as every tactical decision Petitioners make would be controlled by the decisions below, which found even the most fundamental protections of the Constitution inapplicable.

If the Constitution truly does not constrain these trials, with the eyes of the world upon them and with the very life of these men at stake, such a pronouncement must come from this Court, and in advance of trial so that the litigants can plan accordingly.

Petitioners believe that those facing detention have access to the Great Writ. Regardless of whether this is so, access to the writ for those facing novel and untested military commissions lies at the core of traditional habeas jurisprudence – as *Milligan*, *Qurin*, and *Yamashita* each underscore. In this area of *criminal* enforcement, the Court's institutional competence is at its height, and the harmful consequences of the writ being granted (if any) are at their nadir.

D. Nor can the Government avoid Petitioners' Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas. At the very least, the timing of review under the MCA renders it insufficient. At common law, courts used habeas to consider pre-trial claims. *Ex parte Royall*, 117 U.S. 241, 253 (1886). By contrast, the DTA defers even its limited review until a "final decision" of a CSRT, DTA § 1005(e)(2), and the MCA defers review until a "final decision" of a military commission, MCA § 3(a) (adding 10 U.S.C. § 950g). Prohibiting judicial review until after these proceedings prevents detainees from vindicating rights violated by the very fact of being tried by an illegal tribunal in the first place. *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)) ("abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all'").

Furthermore, under the MCA, the Executive can avoid *all* judicial review merely by failing to issue a final decision. This ability to avoid any review whatsoever is inconsistent with a core function of habeas, which "has always been available to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305. The scope of review under the MCA also falls short of the

inquiry authorized by constitutional habeas. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). The MCA only permits review of "whether the final decision was consistent with the standards and procedures specified" by the MCA, and with federal law and the Constitution to the extent that they apply. MCA § 3(a).[21] Thus, for example, the MCA does not permit challenges to conditions of detention, a category of claims available under constitutional habeas.[22]

The MCA is also ambiguous as to whether the D.C. Circuit can review challenges to the constitutionality of the MCA as a whole. A broad constitutional challenge to the MCA does not clearly fall within the restrictive language describing the scope of review. But such a challenge is a central part of constitutional habeas. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

Moreover, the MCA precludes the federal courts from considering Petitioners' treaty claims, by restricting the scope of review to consistency with federal law and the Constitution. MCA § 3(a), § 950g(c). Under common law habeas, in contrast, courts consider and vindicate treaty-based rights. *See, e.g., Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887). Although Congress is free to abrogate treaties entirely, it must do so with a clear statement; otherwise, courts interpret federal

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[21] The D.C. Circuit also has the power to review final decisions of a CSRT. The scope of review is analogous, except that the court is permitted to review whether the decision was "supported by a preponderance of the evidence." MCA § 7(a); DTA § 1005(e).

[22] *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."); *In re Bonner*, 151 U.S. 242 (1894) (granting habeas petition alleging detention at the wrong type of prison). This is directly relevant in this case, as the new "Camp 6" facility at Guantanamo subjects detainees to virtual solitary confinement – inhumane conditions that violate Common Article 3. R. Jeffrey Smith & Julie Tate, *Uighurs Detention Conditions Condemned*, Wash. Post, Jan. 30, 2007, at A04. Although such challenges are brought under § 1983, *see Preiser*, 411 U.S. at 498, "[habeas] review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (citation omitted).

law as being consistent with international law obligations. *Cook v. United States*, 288 U.S. 102, 120 (1933); *see also The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The MCA does not constitute any such clear statement—on the contrary, it purports to uphold the Geneva Conventions, *see* MCA § 6—and Petitioners therefore retain their treaty rights but lack a forum in which to vindicate them.

Finally, the MCA precludes review of the sufficiency of the evidence after commission proceedings. This procedure departs significantly from the factual inquiry available under common law habeas. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting writ after considering the evidence and determining no crime had occurred); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies supporting their claims for release); *Schiever*, 97 Eng. Rep. 551 (same); *see also* Dallin H. Oaks, *Legal History in the High Court– Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

**III. The MCA Is Unconstitutional.**

Certiorari is also appropriate because this case presents fundamental questions concerning the separation of powers, specifically, whether the MCA's jurisdiction-stripping provisions interfere with the judicial function and violate Bill of Attainder and equal protection guarantees.

A. First, the MCA violates *United States v. Klein*, 80 U.S. 128 (1871), by stripping jurisdiction to prevent implementation of this Court's ruling that Petitioners can invoke rights secured by the Geneva Conventions. *Klein* struck down a statute that prevented courts from giving effect to a presidential pardon, and removed appellate jurisdiction over cases in which a pardon was used to evidence loyalty. It held that Congress's manipulation of jurisdiction, which "allowe[d] one party to the controversy to decide it in its own favor," violated separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

Here, the MCA prescribes rules of decision within the meaning of *Klein* by simultaneously voiding this Court's

holding in *Hamdan*[23] and stripping federal courts of the power to review that nullification. Because this Court has made clear that the detainees at Guantanamo, including Hamdan and Khadr, have rights under the Geneva Conventions that must be respected, *Hamdan*, 126 S. Ct. at 2796, the jurisdiction-stripping provisions are tantamount to allowing one party to decide a controversy it in its own favor by removing jurisdiction from courts that would otherwise give effect to the Court's ruling. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.").[24] The MCA's provisions are particularly problematic as applied to Hamdan because they purposefully interfere with the ability of the federal courts (such as the court below on remand) to enforce this Court's previous disposition of Hamdan's case. *Cf. id.* at 228 (separation of powers is "violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons"). This Court's guidance on *Klein*'s scope would clarify whether jurisdiction-stripping legislation that targets a specific ruling "passe[s] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147.

B. Second, the jurisdiction-stripping provisions of the MCA also violate the prohibition on bills of attainder, a mechanism

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[23] The MCA provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights." MCA § 3(a), § 948b(g). This provision invades the judicial function because this Court has already ruled that the Geneva Convention protects Petitioners. *Hamdan*, 126 S.Ct. at 2796 ("Common Article 3...is applicable here and requires that Hamdan be tried by a regularly constituted court"). *See also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173, 177 (1803))

[24] By stripping Petitioners of Geneva Convention protections guaranteed by this Court's June 2006 decision, the MCA removes all treaty-based defenses and effectively operates as a "means to an end" in the same manner as the unconstitutional statute at issue in *Klein*. 80 U.S. at 145.

for ensuring the separation of powers. Laws are Attainders when they inflict "legislative punishment, of any form or severity, on specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965); *see also Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. 841, 841 (1984).[25]

The MCA singles out non-citizens who—like Petitioners—the Government has unilaterally and extra-judicially labeled "unlawful enemy combatants," i.e., criminals, and then punishes them by depriving them of full and complete habeas review based solely on that status. MCA § 7. A law meets the "singling out" requirement if it operates against a group based on past actions or status designations that cannot be changed. *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (striking down a law that punished former confederates as an unlawful Attainder); *Ex parte Garland*, 71 U.S. 333, 376 (1866).

The MCA inflicts punishment by stripping detainees of access to federal courts via habeas. First, this Court has historically recognized that the deprivation of full and complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872) (holding that a West Virginia law limiting the access to the courts afforded to former confederate sympathizers was an unlawful attainder).[26] Second, the jurisdiction-stripping provisions of the MCA impose a burden on Petitioners that greatly outweigh any non-punitive purpose in depriving them of habeas rights. The Attainder Clause is intended to prevent "punishment without trial by duly

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[25] The Attainder Clause, which acts as a bulwark against Congress's interference with the prerogatives of the Judiciary, was prompted by "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 480 (1977). Although Petitioners are protected by the Due Process Clause, this Attainder Clause argument does not depend on that fact since structural limits on Congress's power are exempt from an analysis of whether the claimant has individual constitutional rights. *See supra* pages 18-21.

[26] This Court continues to read *Pierce* for the proposition that denying complete access to courts qualifies as attainder. *E.g. Brown*, 381 U.S. at 448 n.21. And it has long recognized that more than criminal sanctions qualify as attainders. *Cummings*, 71 U.S. at 320 ("deprivation of any rights, civil or political, previously enjoyed may be punishment").

constituted courts." *See United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (citing *Kahanamoku*, 327 U.S. 304). And third, the legislative history of the MCA illustrates that stripping the courts of habeas jurisdiction reflected a desire to punish those whom Congress viewed as unworthy of trial in U.S. courts.[27] This Court should clarify the scope of the Attainder Clause by determining whether the MCA runs afoul of that provision.

C. Certiorari before judgment is also appropriate to address whether the MCA interferes with the fundamental right of equal access to the courts in contravention of the Equal Protection guarantee of the Fifth and Fourteenth Amendments.[28] *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (laws withdrawing access to fundamental rights are subject to strict scrutiny); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (discrimination in providing access to courts violates equal protection). In using alienage as the dividing line, the MCA is subject to heightened scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371 (1971) ("[C]lassifications based on alienage...are inherently suspect and subject to close judicial scrutiny."); *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Congress cannot selectively exclude a suspect class from access to the courts without satisfying strict scrutiny review.[29] The

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[27] *See, e.g.*, 152 Cong. Rec. S10238-01, at S10239 (daily ed. Sept. 27, 2006) (statement of Sen. Lott) ("Now we have this huge discussion about habeas corpus. Bring on the lawyers. What a wonderful thing we can do to come up with words like this. Our forefathers were thinking about citizens, Americans. They were not conceiving of these terrorists who are killing these innocent men, women, and children.").

[28] The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."). The Supreme Court has recognized that the Fifth Amendment's Due Process Clause embraces the same "concept of equal justice under law," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), and accordingly "require[s] the same type of analysis." *Id.*

[29] Congress was able to pass the MCA so quickly—just three weeks after the Administration proposed the bill—only because it affects a class with no say in the political process, namely aliens. *See United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (noting that statutes directed at "discrete and insular minorities" may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities,

Constitution's guarantee of equal protection serves to ensure that the most vulnerable are in some sense represented by those with an adequate voice in the polity. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

Strict scrutiny is separately appropriate because the MCA unequally obstructs access to what is arguably the Constitution's most fundamental right—the right to seek relief under habeas corpus. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"). Far less intrusive measures restricting access to courts have failed strict scrutiny. *E.g.*, *Douglas v. California*, 372 U.S. 353, 358 (1963) (striking down law allowing appellate courts to decide whether indigent defendants would receive appellate counsel); *Griffin*, 351 U.S. at 15-16 (invalidating regulation denying access to court transcript).

Although the MCA triggers strict scrutiny both by interfering with a fundamental right and by targeting a suspect class, *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896), the district court refused to grant *any* scrutiny whatsoever to Hamdan's claims and the circuit court's decision did not address equal protection issues. The statute's dramatic disparity between aliens and citizens should not go unchecked by this Court. If withdrawal of habeas jurisdiction is necessary to "win" the War on Terror, then it should be withdrawn for similarly situated American citizens, not simply the powerless.[30]

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and...may call for a correspondingly more searching judicial inquiry.").

[30] Judicial invalidation of the MCA on this ground would leave the Government with tremendous flexibility. *Cf. Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Invocation of the equal protection clause [compared to the due process clause] . . . does not disable any governmental body...It merely means that the prohibition or regulation must have a broader impact.....[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

## IV. The Federal Courts Retain Statutory Jurisdiction To Consider Hamdan and Khadr's Petition.

A. The courts below erred in concluding that the MCA's jurisdiction-stripping provisions applied to pending cases. Ignoring well-settled canons of construction, they interpreted ambiguous statutory language as repealing habeas jurisdiction retroactively, in a way that presented constitutional questions of the highest order. Instead, the courts should have applied the "[o]rdinary principles of statutory construction" used earlier by this Court to conclude that the DTA did not remove jurisdiction over this pending case. *Hamdan*, 126 S. Ct. at 2764. Those principles include presumptions against habeas repeal, against retroactivity, and against interpretations that trigger constitutional questions, all of which favor the continued exercise of jurisdiction in this case. *See id.* at 2765; *St. Cyr*, 533 U.S. at 298. The only cases in which this Court has ever found retroactive effect have involved statutory language "'so clear that it could sustain only one interpretation.'" *Id.* at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Section 7(a) of the MCA adds a new subsection (e) to the federal habeas statute, 28 U.S.C. § 2241. Subsection (e) is divided into two subparts. Subpart (1) divests courts of jurisdiction over *habeas applications* filed by aliens determined to be enemy combatants, or awaiting such determination. Subpart (2) divests courts of jurisdiction, except as preserved in the DTA, over any *other actions "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien*" determined to be an enemy combatant, or awaiting such determination. (Emphasis added.) Section 7(b) of the MCA provides that § 7(a) takes effect on the date of enactment (which was October 17, 2006) and applies to "all cases, without exception, pending on or after the date of enactment of this Act *which relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* detained by the United States since September 11, 2001." (Emphasis added.)

Significantly, § 7(b) does not expressly refer to *habeas*

*cases* pending on the date of enactment.[31] Instead, the language of § 7 tracks, virtually word for word, the language used in (e)(2) to refer to "*other actions*" relating to detention, transfer, treatment, et cetera, of detainees. (Emphasis added.) In determining that similar jurisdictional provisions of the DTA did not apply to this case because it was pending on the date of enactment of the DTA, this Court relied on a "negative inference [that] may be drawn from the exclusion of language from one statutory provision [when that language] is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. 2765. Here, the same negative inference may be drawn from the absence of any express reference to a pending *habeas application* in § 7(b), in contrast to § 7(b)'s use of exactly the same terms as (e)(2) to identify the cases to which it applies. This indicates that the pending cases to which the new statute is intended to apply are precisely those described in (e)(2).

Such a reading is consistent with congressional intent to separate, and treat differently, two different types of actions: mundane challenges to only an "aspect" of detention or trial versus those challenging the system as a whole.[32]

Furthermore, this interpretation of the MCA is consistent with its drafting history. Congress declined to enact two

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[31] The absence of any mention of habeas in § 7(b) is made even more conspicuous by the fact that habeas actions are explicitly mentioned in MCA § 3(a), which divests courts of jurisdiction over all actions, including habeas petitions, "relating to the prosecution, trial, or judgment of *a military commission* under this chapter." (Emphasis added.) This section of the MCA does not revoke the Court's jurisdiction over Petitioners' challenges because, as the section's title makes clear, it concerns routine challenges to the commission's "Procedures and Actions." Petitioners are not challenging a discrete procedure or action of the commission—they are challenging the new system in its entirety. Furthermore, even if § 3(a) were implausibly read to bar challenges to the military commission system as a whole, Petitioners' actions would still survive, because they include a separate challenge to their detention as enemy combatants, which are not affected by § 3(a).

[32] This Court found a similar distinction when it considered the DTA, noting that Congress may have had "good reason" to preserve jurisdiction for those cases that "challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed," while "channel[ing] to a particular court and through a particular lens of review" those "more routine challenges to final decisions rendered by those tribunals." 126 S. Ct. at 2769.

versions of MCA § 7 that would have expressly stripped jurisdiction over pending habeas cases. *See* H.R. 6054, 109th Cong. § 5 (2006); S. 3886, 109th Cong. § 105 (2006). Congress instead decided to enact a bill that did not expressly divest courts of jurisdiction over pending habeas cases *and* without an explicit retroactivity provision. Congress's rejection of the very language that would have achieved the result the district court found here weighs heavily against the lower court interpretation.

B. Finally, this case tests whether Congress has exceeded its legislative authority in enacting the MCA. As described above, Petitioners contend that the MCA's jurisdiction-stripping provisions interfere with the judicial function, violate the Bill of Attainder Clause, and contravene Equal Protection guarantees. The district court erred in failing to reach these arguments because it determined that the MCA had divested it of jurisdiction to consider the habeas petition. App. 15a-16a & n.16. But jurisdiction-stripping provisions that violate the Constitution, as those in the MCA do, cannot shield themselves from judicial review. *United States v. United Mine Workers of America*, 330 U.S. 258, 291-97 (1947). To allow such bootstrapping would undermine the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This Court should consider whether the MCA is unconstitutional because Congress lacked the authority to enact it. Review of these cases is appropriate because Petitioners' constitutional challenges include one based on an effort by Congress and the President to nullify a ruling of this Court in the *Hamdan* case, a ruling which protects both Hamdan and Khadr as they attempt to defend themselves in their impending trials.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari and a Writ of Certiorari Before Judgment should be granted.

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Date: February 27, 2007

# APPENDIX

# APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1519 (JR)

SALIM AHMED HAMDAN, PLAINTIFF,

v.

DONALD H. RUMSFELD, DEFENDANT.

December 13, 2006

## MEMORANDUM

The government seeks dismissal of the petition of Salim Ahmed Hamdan for a writ of habeas corpus for lack of subject matter jurisdiction, relying upon the jurisdiction-stripping provisions of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA) [75]. Petitioner resists, arguing that the MCA did not remove our jurisdiction over pending Guantanamo habeas petitions, and alternatively that, if it did, it was an unconstitutional suspension of the writ of habeas corpus [78].

### Background

Salim Ahmed Hamdan, a Yemeni national, was taken into United States military custody in Afghanistan in November 2001. He was transported to the Defense Department's detention facility at Guantanamo Bay in June 2002. In July 2003, the President declared him eligible for trial by military commission. On April 6, 2004, Hamdan petitioned for

mandamus or habeas corpus in the United States District Court for the Western District of Washington. On July 13, 2004, after having been held for about two years and eight months without formal charges, Hamdan was finally charged at Guantanamo Bay with a single count of conspiracy. In August 2004, his habeas petition was transferred to this court.

On November 8, 2004, I granted Hamdan's petition for a writ of habeas corpus after finding that he could not be tried lawfully before a military commission that had not been approved by Congress, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). That decision was reversed by a panel of the D.C. Circuit on July 15, 2005, 415 F.3d 33, in a decision that was itself reversed a year later by the Supreme Court, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), four justices noting that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to lawfully try enemy combatants, *Id.* at 2799, (Breyer, J., concurring).[1] On September 22, 2006, the Court of Appeals remanded the case to me "for further proceedings." The remand order contained no instructions, nor was it clear what proceedings, if any, would be possible — for, by that time, the President had indeed "return[ed] to Congress," and he had asked Congress to strip the federal courts of their jurisdiction to hear any habeas petitions of the Guantanamo detainees.

On September 29, 2006 Congress enacted, and on October 17, 2006, the President signed, the Military Commissions Act. The day after the MCA became law, the government filed, in each of the 181 Guantanamo habeas cases pending in this Court, a Notice of Military Commissions Act of 2006 [75], highlighting the jurisdiction-stripping and retroactivity provisions of the Act. The government focused on section 7 of the Act, which amends the federal habeas statute by removing the jurisdiction of any "court, judge, or justice" over habeas petitions and all other actions filed by aliens who are either detained as enemy combatants or are "awaiting such determination." MCA § 7(a). I construed that notice as a motion

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[1] Four justices also concluded that conspiracy is not an offense that may be tried by a military commission. *Id.* at 2779.

to dismiss for lack of subject matter jurisdiction and called for a response from Hamdan [77].[2]

**Analysis**

The Military Commissions Act and the briefs of the parties present three questions: (1) As a matter of statutory interpretation and construction, did Congress actually succeed in removing our statutory habeas jurisdiction over the detainee habeas cases? (2) If so, is the Military Commissions Act a constitutionally valid "suspension" of the writ of habeas corpus within the meaning of the Suspension Clause, U.S. Const. art. I § 9 cl. 2? (3) If not, and if a "constitutional" writ of habeas corpus survives the Military Commissions Act, does Hamdan have a right to seek such a writ? The answers to these questions are "yes" to number (1) and "no" to numbers (2) and (3).

**1. The MCA reflects clear congressional intent to limit the statutory habeas jurisdiction of the federal courts.**

It has been clear since *Ex Parte Yerger*, 75 U.S. 85 (1869) (habeas petition by a prisoner facing trial by military commission), that statutory language will be interpreted as stripping courts of their habeas jurisdiction only when the intent of Congress is abundantly clear. "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). In the instant case, it appears to be conceded that Congress's intent to remove jurisdiction over future habeas petitions filed by a specified class of individuals

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[2] I did not issue similar orders in the 14 other Guantanamo habeas cases on my own docket, in deference to the continuing pendency before the Court of Appeals of two cases in which that court has asked for supplemental briefing on the effect of the Military Commissions Act, *Boumediene, et al. v. Bush*, 450 F. Supp. 2d 25 (D.D.C. 2006) (appeal pending); *Al Odah, et al. v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004) (appeal pending). Hamdan's successful certiorari petition in the Supreme Court, however, sets his case apart from the others. Unlike the petitioners in those other cases, moreover, Hamdan moved for a briefing schedule on the subject of jurisdiction [73] even before the government filed its notice.

was clear enough. Hamdan's submission, however, is that the MCA lacks the requisite clarity to support its retroactive operation — stripping the courts of their jurisdiction over previously filed habeas cases.

Section 7 of the MCA provides:

> (a) IN GENERAL. — Section 2241 of title 28, United States Code [the habeas statute], is amended by . . . inserting the following new subsection (e):
>
> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (b) EFFECTIVE DATE. — The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Relying on what he calls "[o]rdinary principles of statutory construction," [78 at 10] and quoting *Hamdan*, 126 S. Ct. at 2765-69, Hamdan argues that the retroactivity provision of § 7(b) does not clearly apply to the habeas jurisdiction-stripping provision of § 7(a), because, while the language of § 7(b) tracks much of the language in § 7(a) describing cases *other* than habeas petitions, it does not explicitly refer to habeas petitions. The argument is unsuccessful.

Section 7(b) instructs that "the *amendment* made by subsection (a)" is effective immediately, and that it applies both retroactively and prospectively. New subsections (e)(1) and (e)(2) both amend the habeas statute and therefore together comprise "the amendment made by subsection (a)." Section 7(b), then, means that all of § 7(a), and not just the part encompassed in new subsection (e)(2), applies retroactively.

Application of the retroactivity clause in § 7(b) to new subsection (e)(1) is also compelled by the framework of the statute. The references in section 7 are to one large category of cases: those cases that relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of certain aliens. In § 7(a), Congress divided this broad category into two subcategories — (1) habeas petitions and (2) "any other action[s] against the United States . . . relating to any aspect of the detention . . ." — and removed jurisdiction over both types of cases. "Other," as used in this subsection, logically describes cases other than the habeas petitions referenced in the previous subsection and confirms the inclusion of habeas proceedings within the broader category encompassing "all cases . . . pending on or after the date of enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." Section 7(b) applies "without exception" to the broad category of cases encompassing both subcategories addressed in new subsections (e)(1) and (e)(2); this language is "so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997). Habeas petitions are thus clearly within the ambit of § 7(b).

**2. The MCA is not a constitutionally valid suspension of the writ of habeas corpus.**

Congress unquestionably has the power to establish and to define the jurisdiction of the lower federal courts. U.S. Const. art. III, §§ 1, 2. But it does not necessarily follow, from the fact that Congress has repealed its statutory grant of habeas jurisdiction, that Congress has also "suspended" the writ. Some historical background will be helpful in explaining why this is so.

The history of habeas corpus — the "symbol and guardian of individual liberty," *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) — is well established. What we now know as the "Great Writ" originated as the "prerogative writ of the Crown";[3] its purpose at first was to bring people into court rather than out of imprisonment. Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. Sch. J. Hum. Rts. 375, 378 (1998), citing S.A. DeSmith, *The Prerogative Writs*, 11 Cambridge L.J. 40 (1951); William F. Duker, *A Constitutional History of Habeas Corpus* 17 (1980). By the year 1230, the writ's utility for that purpose was a well-known aspect of English common law. Clarke, *supra*.

The transformation of the writ to a guardian of liberty dates to the 14th century, when the Norman Conquest overlaid a centralized court system on top of the existing courts. It was during this period that prisoners began to initiate habeas proceedings to challenge the legality of their detention. *Id.* The first such use was by detained members of the privileged classes who raised habeas claims in superior central courts to challenge their convictions in inferior courts; central courts would grant such writs to assert the primacy of their jurisdiction. *Id.* Thus, oddly enough, the original use of the writ by prisoners challenging convictions or detentions had more to do with jurisdictional disputes between courts than concerns over liberty. *Id.*; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970-71 (1998).

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[3] Standing alone, the phrase "habeas corpus" refers to the common law writ of habeas corpus ad subjiciendum, or the "Great Writ." *Preiser v. Rodriguez*, 411 U.S. 475, 484-85 and n.2 (1973) citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

As the power of the common law courts expanded in the 15th century, so too did the availability and meaning of habeas corpus. The writ became a favorite tool of both Parliament and the judiciary in battling the monarch's assertion of unbridled power. Clarke, *supra* at 380. By 1670, habeas corpus was "the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." *Bushell's Case*, Vaughan 135, 136, 124 Eng. Rep. 1006, 1007. The growing significance of the writ is reflected in the Habeas Corpus Act of 1679, described by Blackstone as "a second *magna charta*, a stable bulwark of our liberties." 1 Blackstone 133.

Notwithstanding the cherished status of habeas corpus, its suspension in England was not uncommon. The writ was suspended in 1688 and 1696 because of conspiracies against the king, again during the American revolution, and at other points during the 18th century. Rex A. Collings, Jr., *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 339 (1952).

Colonists in America were well aware of the growing significance of the Great Writ, and many asserted a common law right to habeas corpus in the period leading up to the adoption of the Constitution. Massachusetts, New Hampshire, and Georgia adopted constitutional provisions guaranteeing the writ or prohibiting its suspension under most circumstances. Max Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 338 n.14 (1983). Several delegates to the Constitutional Convention sought to include a guarantee of habeas corpus in the federal Constitution, Erwin Chemerinsky, *Thinking about Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 752, and the language that emerged from the Constitutional Convention, forbidding the suspension of habeas unless necessary in the face of "rebellion or invasion," U.S. Const. art. I, § 9, cl. 2, was a compromise. Habeas corpus nevertheless enjoys powerful and unique constitutional stature as the only common law writ explicitly referenced in the Constitution. The first session of Congress also evinced appreciation for the writ: in section 14 of the Judiciary Act of 1789, Congress affirmatively gave the power to issue writs of

habeas corpus to the newly created federal courts. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat 73, 81. It is that statute, amended several times over the last 217 years, that the MCA has amended once again: this time to take away jurisdiction.[4]

Article I, section 9, clause 2 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." "Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I." *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting), citing Ex parte Bollman, 8 U.S. at 101; *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story § 1336, at 208-209.[5]

Congress has authorized executive suspension of the writ only four times. *See* Duker, *supra* at 149, 178 n.190. All such suspensions were accompanied by clear statements expressing congressional intent to suspend the writ and limiting the suspension to periods during which the predicate conditions (rebellion or invasion) existed. *Id.* The first such instance was during the Civil War, when the status and availability of habeas corpus were at the center of an epic struggle. In 1861, without congressional authorization, President Lincoln gave the Commanding General of the Army permission to suspend the writ in response to rioting between Philadelphia and Washington as Union troops moved down the coast. A. Lincoln, Letter to Commanding General Winfield Scott, (April 27, 1861), reprinted in *Abraham Lincoln: Speeches and Writings,*

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[4] The MCA may not have been Congress's last word on the statutory habeas rights of detainees such as Hamdan. On December 5, 2006, Senators Specter and Leahy introduced the Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong. (2006), which would grant statutory habeas rights to those whose rights were repealed by the MCA.

[5] In his dissent in *Hamdi*, Justice Scalia also makes reference to President Jefferson's unsuccessful attempt to suspend the writ in response to the Aaron Burr conspiracy. *Hamdi*, 542 U.S. at 563 (Scalia, J. dissenting), *citing* 16 Annals of Congress 402-425 (1807).

*1859-1865*, at 237 (D. Fehrenbacher ed. 1989). John Merryman was subsequently arrested for interfering with troop movements and challenged the executive suspension of the writ. Chief Justice Taney, riding circuit, heard the case and ruled in Merryman's favor, holding that only Congress may suspend the writ. *Ex parte Merryman*, 17 F. Cas. at 151-152. Lincoln ignored Taney's order, but Congress eventually authorized executive suspension, mooting the question of whether or not Lincoln's initial suspension was unconstitutional and avoiding a Supreme Court test. Act of Mar. 3, 1863, 12 Stat. 755. Thereafter, Lincoln's suspensions explicitly relied upon the congressional grant of authority. *See, e.g.*, Proclamation No. 7, 13 Stat. 734 (1863).

After the Civil War, Congress next authorized executive suspension of the writ in its Ku Klux Klan Act, which allowed President Grant to suspend the writ while rebellions were raging in several South Carolina counties. Duker, *supra* at 178 n.190. Congress's last two authorizations for executive suspension of the writ were in 1902, when it granted suspension power to the President and the governor during a rebellion in the Philippines,[6] and in 1941, after the attack on Pearl Harbor, when Congress authorized the governor of Hawaii to temporarily suspend the writ in that territory.[7] All four congressionally authorized executive suspensions occurred during times of indisputable, and congressionally declared, rebellion or invasion.

The Supreme Court has never decided whether an Act of Congress alone has effectively "suspended" the writ. In two relatively recent cases involving the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), indeed, the Court has carefully avoided saying exactly what the Suspension Clause protects. In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court, per Rehnquist, C.J., "assume[d], for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today,

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[6] Act of July 1, 1902, ch. 1369, 32 Stat. 691.

[7] *See Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

rather than as it existed in 1789," but held that the restrictions placed by the AEDPA upon second and successive statutory habeas petitions by prisoners were "well within the compass of [the writ's] evolutionary process, and . . . do not amount to a 'suspension' of the writ contrary to Article I, § 9." 518 U.S. at 663-64. In *INS v. St. Cyr*, 533 U.S. 299 (2001), the Court rejected the government's argument that the AEDPA and the IIRIRA had effectively stripped the federal courts of jurisdiction to decide questions of law. Acknowledging that the scope of the writ has expanded significantly since the Founding, the Court noted that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 1788 (quoting *Felker*). And the Court went on to observe:

> The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely. Cf. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L.Rev. 961, 980 (1998) (noting that "reconstructing habeas corpus law . . . [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions").[8]

*Id.* at n.13. Whether the Suspension Clause protects only the "writ antecedent to statute," *Williams v. Kaiser*, 323 U.S. 471, 484 (1945), or "the writ as it exists today," *Felker*, 518 U.S. at 663, its protection is absolute in the absence of "invasion" or

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[8] In both *Felker* and *St. Cyr*, the Court was quick to point out that neither the AEDPA nor the IIRIRA purported to repeal its own original jurisdiction of habeas cases, which was expressly granted by the Judiciary Act of 1789, *Felker*, 518 U.S. at 660-61, quoted in *St. Cyr*, 533 U.S. at 298-99. The jurisdiction-stripping language of the MCA, of course, does purport to repeal the habeas jurisdiction of Supreme Court justices ("No court, *justice* or judge . . . ." MCA § 7(a)).

"rebellion." Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was "suspending" the writ with the enactment of the MCA, since it made no findings of the predicate conditions, as it did when it approved Lincoln's suspension in the Civil War and each of the subsequent suspensions in Mississippi, the Philippines, and Hawaii. Thus, the Great Writ has survived the Military Commissions Act. If and to the extent that the MCA operates to make the writ unavailable to a person who is constitutionally entitled to it, it must be unconstitutional.

**3. Hamdan is not entitled to the constitutional writ that survives the MCA.**

The jurisdiction of federal courts over the habeas petitions of detainees at Guantanamo Bay rested upon the grant of jurisdiction in the habeas statute and upon the United States' exercise of "complete jurisdiction and control" over the Navy base in Cuba. *Rasul*, 542 U.S. 466, 471, 481 (2004). Because the habeas statute drew no distinction between citizens and aliens, moreover, the Court found "little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481. My original assumption of jurisdiction of Hamdan's habeas petition depended entirely upon *Rasul* and upon § 2241, 344 F. Supp. 2d at 156. Now that the MCA has amended § 2241 so that it no longer serves as the basis for my jurisdiction, I must inquire whether Hamdan or any other alien is constitutionally entitled to the writ.

It has long been the practice of judges to ascertain the "meaning of the term habeas corpus [by reference to] the common law." *Ex parte Bollman*, 8 U.S. at 93-94 (1807). Petitioner cites at least two English common law cases in which "aliens detained by the Executive at wartime" brought habeas petitions challenging their designation as enemies. [78 at 20], citing *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779); *Rex v. Schiever*, 97 Eng. Rep. 551 (K. B. 1759). In dicta, the majority in *Rasul* cited several other examples of pre-

1789 habeas petitions brought by aliens detained within the sovereign territory or elsewhere within the sovereign's control. *Rasul*, 542 U.S. at 481 n.11.[9] Unfortunately, those cases do not so easily resolve the issue when the statutory grant of habeas has been withdrawn. In each of them, habeas relief was either (1) denied, in an opinion that failed to distinguish between jurisdictional and substantive grounds for the dismissal;[10] (2) denied to a prisoner of war without connections to the country in which the writ was sought;[11] or (3) granted to an alien with a significant relationship to the country in which the writ was sought.[12] Not one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States — or in "territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475 — had a common law or constitutionally protected right to the writ of habeas corpus.[13]

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[9] The court supplied the following list of English and American habeas proceedings prior to 1789 and shortly thereafter: *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K. B. 1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810)); *United States v. Villato*, 2 Dall. 370, 2 U.S. 370, 1L. Ed. 419 (CC Pa. 1797); *Ex parte D'Olivera*, 7 F. Cas. 853, F. Cas. No. 3967 (CC Mass 1813) (Story, J., on circuit); *Wilson v. Izard*, 30 F. Cas. 131, F. Cas. No. 17810 (CC NY 1815) (Livingston, J., on circuit).

[10] *See, e.g.*, *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775, 776 (C.P. 1779); *Rex v. Shiever*, 97 Eng. Rep. 551 (K. B. 1759). Note, too, that petitioners in both of these cases were held within English sovereign territory, unlike petitioner Hamdan.

[11] *Rex v. Schiever* falls under this category as well: "[petitioner] is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war." 96 Eng. Rep. 1249 (K. B. 1759).

[12] *See, e.g.*, *U.S. v. Villato*, 2 U.S. 370, 28 F. Cas. 377, 1 L. Ed. 419 (No. 16,622) (Pa. 1797) (petitioner, though Spanish-born, had traveled from New Orleans to Philadelphia and attempted to become a citizen before the offense that precipitated his detention).

[13] Note that even *INS v. St Cyr*, heavily relied upon by petitioner Hamdan and filled with language extolling the importance of habeas corpus in challenging executive detention, contains this limited description of the rights herein asserted: "[i]n England prior to 1789, in

The petitioner in *Sommersett v. Stewart* was not an enemy alien but a slave challenging his enslavement. Unlike Hamdan, James Sommersett was temporarily residing in England, and the asserted unlawfulness of his confinement stemmed from the arguable illegality of slavery in England. 98 Eng. Rep. 499 (K. B. 1772). In the *Case of the Hottentot Venus*, Saartje Baartman — a South African exhibited in a cage in Piccadilly, England — was a non-enemy foreigner from the British Protectorate of South Africa who could invoke the protection of the Crown by right. 104 Eng. Rep. 344 (K. B. 1810).

In American habeas actions, alien petitioners have had access to the writ largely because they resided, lawfully or unlawfully, on American soil. *See, e.g.*, *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (alien, while alleged to have entered the country unlawfully, nevertheless had made himself "a part of its population"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (petitioner had been a legal resident of the United States for over twenty years). Hamdan has been a prisoner of the United States for five years. He has lived nearly all of that time within the plenary and exclusive jurisdiction of the United States, but he has not become a part of the population enough to separate himself from the common law tradition generally barring non-resident enemy aliens from accessing courts in wartime. *See Ex parte Kawato*, 317 U.S. 69, 72-75 (1942) (describing common law rule). His detention in Guantanamo, in other words, has not meaningfully "increase[d] his identity with our society." *Eisentrager v. Johnson*, 339 U.S. 763, 770 (1950).

It is the *Eisentrager* case that appears to provide the controlling authority on the availability of constitutional habeas to enemy aliens.[14] In that case, petitioners were Germans living in China in the aftermath of World War II. *Id.* at 765. After trial

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the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to *nonenemy aliens* as well as to citizens," 533 U.S. at 301.

[14] *Eisentrager* was unimportant to the statutory habeas question presented the last time Hamdan was here, as the Supreme Court had made plain in *Rasul*, 542 U.S. at 475-76, and was not dispositive on the questions presented in the earlier *Hamdan* case, 126 S. Ct. at 2794.

before a United States Military Commission in China, they were convicted of war crimes and sent to occupied Germany to serve their sentences. *Id.* at 766. The Supreme Court held that they had no constitutional entitlement to habeas relief in U.S. Courts because "at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.

Hamdan contends that several of the differences between the Guantanamo petitioners and the *Eisentrager* petitioners are constitutionally significant. First, he notes that the *Eisentrager* petitioners admitted that they were enemy aliens, whereas petitioner Hamdan has always objected to his classification as an unlawful enemy combatant [78 at 25]. Here, however, as in *Eisentrager* (where petitioners amended their petitions to assert that they had really been civilian employees) Hamdan's "exact affiliation is . . . for our purposes, immaterial." *Eisentrager*, 339 U.S. at 765. Second, Hamdan claims that, unlike the *Eisentrager* petitioners, he has never been afforded access to a proper tribunal. That observation is obviously true, thus far, but Hamdan is to face a military commission newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court. It is difficult to see how continued habeas jurisdiction could make further improvements in his tribunal. Third, Hamdan argues that, after several years in a territory within "the complete jurisdiction and control" of the United States, his relationship with the United States is more extensive than those of petitioners in *Eisentrager*. *See Rasul*, 542 U.S. at 480. This third distinction merits further consideration.

Hamdan's lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique. Nevertheless, as the government argues in its reply brief, his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus [85-1 at 15]. Petitioner has never entered the United States and accordingly does not enjoy the "implied protection" that accompanies presence on

American soil. *Eisentrager*, 339 U.S. at 777-79. Guantanamo Bay, although under the control of the United States military, remains under "the ultimate sovereignty of the Republic of Cuba." *Rasul*, U.S. 542 at 471. Presence within the exclusive jurisdiction and control of the United States was enough for the Court to conclude in *Rasul* that the broad scope of the habeas *statute* covered Guantanamo Bay detainees, but the detention facility lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a *constitutionally* guaranteed writ. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). There is no dispute, moreover, that Hamdan's presence within the exclusive jurisdiction of the United States has been involuntary. Presence within the United States that is "lawful but involuntary [ ] is not of the sort to indicate any substantial connection with our country" that would justify the invocation of a constitutional right to habeas corpus, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).[15]

**Conclusion**

Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional, in the absence of rebellion or invasion), but Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus.[16]

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[15] My ruling does not address whether and to what extent enemy aliens may invoke other constitutional rights; I find only that the Suspension Clause does not guarantee the right to petition for habeas corpus to non-resident enemy aliens captured and detained outside the United States.

[16] Having been divested of jurisdiction over Hamdan's habeas petition, I do not reach his other arguments that the MCA is unconstitutional — because it does not provide an adequate substitute for habeas review, because it violates the principle of separation of powers by instructing the courts to ignore the Supreme Court's ruling that the Geneva Conventions afford judicially enforceable protections to

Hamdan's habeas petition must accordingly be dismissed for want of subject matter jurisdiction.

JAMES ROBERTSON
United States District Judge

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petitioner Hamdan, because it is an unlawful Bill of Attainder, and because it violates Equal Protection.

## APPENDIX B

**The Suspension Clause, U.S. Const. art I, § 9, cl. 2, states:**

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

**U.S. Const., art. I, § 9, cl. 3, states:**

No Bill of Attainder or Ex Post Facto law shall be passed.

**U.S. Const., Amend. 5 states:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const., Amend. 14 states in part:**

[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

## APPENDIX C

1. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, provides in relevant part:

### TITLE X—MATTERS RELATING TO DETAINEES

* * *

### SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

* * *

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS. —

(1) IN GENERAL. — Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider —

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who —

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION. —

(A) IN GENERAL. — Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien —

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of —

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS. —

(A) IN GENERAL. — Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW. — Review under this paragraph —

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien —

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW. — The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with

respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT. — The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

* * *

(h) EFFECTIVE DATE. —

(1) IN GENERAL. — This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS. — Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

* * *

2. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, provides in relevant part:

* * *

**SEC. 3. MILITARY COMMISSIONS.**

(a) MILITARY COMMISSIONS. —

(1) IN GENERAL. — Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

* * *

"§ 948a. Definitions

"In this chapter:

"(1) UNLAWFUL ENEMY COMBATANT. —

(A) The term 'unlawful enemy combatant' means —

"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

"(B) CO-BELLIGERENT. — In this paragraph, the term 'co-belligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy."

* * *

"§ 948c. Persons subject to military commissions

"Any alien unlawful enemy combatant is subject to trial by military commission under this chapter."

"§ 948d. Jurisdiction of military commissions

"(a) JURISDICTION. — A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

"(b) LAWFUL ENEMY COMBATANTS. — Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

"(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE. — A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

"(d) PUNISHMENTS. — A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war."

* * *

"§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

"(a) EXCLUSIVE APPELLATE JURISDICTION. — (1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

"(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

"(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which —

"(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

"(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

"(b) STANDARD FOR REVIEW. — In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

"(c) SCOPE OF REVIEW. — The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of —

"(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

"(2) to the extent applicable, the Constitution and the laws of the United States.

"(d) SUPREME COURT. — The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28."

* * *

"§ 950j. Finality or proceedings, findings, and sentences

"(a) FINALITY. — The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS. — Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter."

* * *

"§ 950p. Statement of substantive offenses

"(a) PURPOSE. — The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

"(b) EFFECT. — Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."

* * *

"§ 950v. Crimes triable by military commissions:

"(24) TERRORISM. — Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM — "

"(A) OFFENSE. — Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

"(B) MATERIAL SUPPORT OR RESOURCES DEFINED. — In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18."

"(28) CONSPIRACY. — Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

* * *

**SEC. 7. HABEAS CORPUS MATTERS.**

(a) IN GENERAL. — Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

(b) EFFECTIVE DATE. — The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

* * *

**SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.**

Section 1005(e)(3) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2740; 10 U.S.C. 801 note) is amended —

(1) in subparagraph (A), by striking "pursuant to Military Commission Order No. 1. dated August 31, 2005 (or any successor military order)" and inserting "by a military commission under chapter 47A of title 10, United States Code";

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):

"(B) GRANT OF REVIEW. — Review under this paragraph shall be as of right.";

(3) in subparagraph (C) —

(A) in clause (i) —

(i) by striking "pursuant to the military order" and inserting "by a military commission"; and

(ii) by striking "at Guantanamo Bay, Cuba"; and

(B) in clause (ii), by striking "pursuant to such military order" and inserting "by the military commission"; and

(4) in subparagraph (D)(i), by striking "specified in the military order" and inserting "specified for a military commission".

* * *

**SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.**

Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2742; 10 U.S.C. 801 note) is amended by striking "the Department of Defense at Guantanamo Bay, Cuba" and inserting "the United States".

* * *

**18 U.S.C. § 2339A(b).**

**(b) Definitions.** — As used in this section —

**(1)** the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| SALIM AHMED HAMDAN,<br><br>Petitioner,<br><br>v.<br><br>DONALD H. RUMSFELD, United States Secretary of Defense, *et al.*,<br><br>Respondents. | CIVIL ACTION NO. 1:04-cv-01519-JR<br><br>**NOTICE OF APPEAL** |

Notice is hereby given that Salim Ahmed Hamdan, Petitioner in the above-named case, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit, from an Order dismissing the case for lack of subject-matter jurisdiction entered in this action on the 13th day of December, 2006.

**LIEUTENANT COMMANDER CHARLES SWIFT**
By /s/ Lieutenant Commander Charles Swift
Lieutenant Commander Charles Swift
N.C. Bar #21084

**PERKINS COIE LLP**
By /s/ Joseph M. McMillan
Harry H. Schneider, Jr. (*pro hac vice*)
Joseph M. McMillan (*pro hac vice*)
Charles C. Sipos (*pro hac vice*)

**NEAL KATYAL**
By /s/ Neal Katyal
Neal Katyal, D.C. Bar #462071
600 New Jersey Avenue, NW

Washington, D.C. 20001
(202) 662-9000

Attorneys for Petitioner Salim Ahmed Hamdan

**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2007, copies of the foregoing **Notice of Appeal**, was served by electronic mail upon the following:

Jonathan L. Marcus
Appellate Section, Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 5636
Washington, D.C. 20530
(202) 514-8976
(202) 307-4613 (facsimile)
Jonathan.L.Marcus@usdoj.gov

Terry Henry
Thomas Swanton
Civil Division
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Avenue, NW, Room 7144
Washington, DC 20530
(202) 514-4107
(202) 616-8470 (facsimile)
Terry.Henry@usdoj.gov
Thomas.Swanton2@usdoj.gov

*Attorneys for Respondents*

/s/ Joseph M. McMillan
Joseph M. McMillan

## APPENDIX E
## NOTIFICATION OF THE SWEARING OF CHARGES

**DEPARTMENT OF DEFENSE**
**OFFICE OF THE CHIEF PROSECUTOR**
**OFFICE OF MILITARY COMMISSIONS**
**1610 DEFENSE PENTAGON**
**WASHINGTON, DC 20301-1610**

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Salim Ahmed Hamdan 0149, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the _____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

PROVIDING MATERIAL SUPPORT FOR TERRORISM

CONSPIRACY

*(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language other than English, that the accused understands.)*

**AFFIDAVIT OF NOTIFICATION**

I hereby certify that a copy of this document was provided to the named detainee this ___ day of _____, 2007.

| | |
|---|---|
| Signature | Organization |
| Typed or Printed Name and Grade | Address of Organization |

| CHARGE SHEET |
|---|
| **I. PERSONAL DATA** |
| **1. NAME OF ACCUSED:**<br>SALIM AHMED HAMDAN |
| **2. ALIASES OF ACCUSED:**<br>Salim Ahmad Hamdan, Salem Ahmed Salem Hamdan, Saqr al Jadawy, Saqr al Jaddawi, Khalid bin Abdalla, Khalid wl'd Abdallah |
| **3. ISN NUMBER OF ACCUSED (LAST FOUR):**<br>0149 |
| **II. CHARGES AND SPECIFICATIONS** |
| **4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.**<br><br>**SPECIFICATION: INTRODUCTION**<br>1. The accused, Salim Ahmad Hamdan, (a/k/a Salem Ahmed Salem Hamdan, Saqr al Jadawy, Saqr al Jaddawi, Khalid bin Abdalla, hereinafter "Hamdan"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:<br><br>**JURISDICTIONS**<br>2. Jurisdiction for this Military Commission is based on Title 10, U.S.C. §948(d), the Military Commission Act of 2006, hereinafter "MCA;" its implementation by the Manual for |

Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of 3 October 2004 that Hamdan is an unlawful enemy combatant as a member or, or affiliated with, al Qaeda.

3. The accused's charged conduct is subject to trial by a military commission. (continued)

**III. SWEARING OF CHARGES**

| **5a. NAME OF ACCUSER** *(Last, First, MI)* | **5b. GRADE** | **5c ORGANIZATION OF ACCUSER** |
|---|---|---|
| TUBBS II, MARVIN, W | O-4 | OMC-PROSECUTION |
| **5d. SIGNATURE OF ACCUSER** | | **5e. DATE (YYYYMMDD)** |
| s/ Marvin Tubbs | | 20070202 |

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

| | |
|---|---|
| WILLIAM B. BRITT<br>*Typed Name of Officer* | OMC-PROSECUTION<br>*Organization of Officer* |
| O-5<br>*Grade* | 10 U.S.C. 1044(b)<br>*Official Capacity to Administer Oath* |
| s/ WILLIAM B. BRITT<br>*Signature* | *(See R.M.C. 307(b) must be commissioned officer)* |

**IV. NOTICE TO THE ACCUSED**

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

| | |
|---|---|
| WILLIAM B. BRITT<br>*Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges* | OMC-PROSECUTION<br>*Organization of the Person Who Caused Accused to Be Notified of Charges* |
| _____<br>*Signature* | |

**V. RECEIPT OF CHARGES BY CONVENING AUTHORITY**

7. The sworn charges were received at ___ hours, on _____, at _____.
*Location*

For the Convening Authority:

_____
*Typed Name of Officer*

_____
*Grade*

_____
*Signature*

**VI. REFERRAL**

| 8a. DESIGNATION OF CONVENING AUTHORITY | 8b. PLACE | 8c. DATE (YYYYMMDD) |
|---|---|---|
| | | |

Referred for trial to the (non)capital military commission convening order: _____
_____.

_____subject to the following instructions[1]: _____
_____

By _____ of _____

| *Command, Order, or Direction* | |
|---|---|
| *Typed Name and Grade of Officer* | *Official Capacity of Officer Signing* |
| *Signature* | |
| **VII. SERVICE OF CHARGES** | |
| 9. On _____, _____ I (caused to be) served a copy these charges on the above named accused. | |
| *Typed Name of Trial Counsel* | *Grade of Trial Counsel* |
| *Signature of Trial Counsel* | |
| **FOOTNOTES** | |
| [1] See R.M.C. 601 concerning instructions. If none, so state. | |

Charge Sheet Continuation Page in the Case of SALIM AHMED HAMDAN

## GENERAL ALLEGATIONS

4. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

5. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

6. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United

States for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

7. Al Qaeda operations and activities have historically been planned and executed with the involvement of a shura (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

8. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

9. In August of 1996, Usama bin Laden issued a public "Declaration of Jihad Against the Americans," in which he called for the murder of U.S. personnel serving on the Arabian peninsula.

10. In February of 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders" issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans - whether civilian or military - anywhere they can be found and to "plunder their money."

11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

12. In or around 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation which has

orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

13. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

14. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

**SUBSTANTIVE OFFENSES**

CHARGE I: Violation of Part IV, MMC §950v(28) - CONSPIRACY

Specification 1:

15. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, willfully join an enterprise of persons who shared a common criminal purpose said criminal purpose known to the said accused and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses subject to trial by military commission: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war,; hijacking or hazarding a vessel or aircraft; and terrorism.

16. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida knowingly committed at least one of the following overt acts in order to accomplish some objective or purpose of the conspiracy, to wit;

a. In 1996, Hamdan met with Usama Bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.

b. From 1996 through November 2001, Hamdan:

1. transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates;

2. picked up weapons at Taliban warehouses for al Qaeda use and delivered them directly to Saif al Adel, the head of al Qaeda's security committee, in Qandahar, Afghanistan;

3. served as a driver for Usama bin Laden and other high ranking al Qaeda members and associates;

4. served as an armed bodyguard for Usama bin Laden and other high ranking al Qaeda members and associates.

c. On various occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the

Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.

d. Between 1996 and November of 2001, Hamdan, on various occasions received weapons training in Afghanistan.

Specification 2:

17. In that Hamdan did, in Afghanistan, on or about November 24, 2001, willfully enter into an agreement with one or more members of al Qaeda or Taliban to commit the offense of Murder in Violation of the Law of War, a substantive offense subject to trial by military commission, to wit; the murder of United States or Coalition service members serving as pilots, crew or passengers of United States or Coalition military aircraft, knowing the unlawful purpose of said agreement and joining into said agreement willingly with the intent to further said unlawful purpose, knowingly commit an overt act in order to accomplish some objective or purpose of said agreement, to wit, transporting one or more SA-7 surface to air missiles to be ultimately used to unlawfully and intentionally kill said United State or Coalition service members said overt act being in violation of the law of war and taking place in the context of and associated with armed conflict.

CHARGE II: Violation of Part IV, MMC §950v(25) - PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1:

18. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: personnel, himself, to be used in preparation for or carrying out an act of terrorism, and that the said Hamdan knew or intended that the said material support or resources were to be used for an act of

terrorism, by joining the terrorist organization known as al Qaeda and performing at least one of the following:

a. Attended and received training at an al Qaeda terrorist weapons training camp;

b. Served as a driver for Usama bin Laden and other high ranking al Qaeda members and associates transporting them to various locations in Afghanistan;

c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to al Qaeda members and associates.

Specification 2:

19. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in context of or associated with an armed conflict and with knowledge that al Qaeda has engaged in or engages in terrorism, did provide material support or resources, to wit: personnel, himself, to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by becoming a member of the organization and performing at least one of the following:

a. Attended and received training at an al Qaida terrorist weapons training camp;

b. Served as a driver for Usama bin Laden and other high ranking al Qaida members and associates transporting them to various locations in Afghanistan;

c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to al Qaida members and associates.

Specification 3.

20. In that Hamdan did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: weapons and weapons systems, to wit; one or more SA-7 surface to air missiles, to be used in preparation for or carrying out an act of terrorism, and the said Hamdan knew or intended that these missiles were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and knowingly provide one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 4.

21. In that Hamdan did, in Afghanistan, on or about November 24, 2001, in context of or associated with .an armed conflict and with knowledge that al Qaeda, has engaged in or engages in terrorism, did provide material support or resources, to wit, weapons and weapons systems, to wit; one or more SA-7 surface to air missiles to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by knowingly provide one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 5.

22. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service or transportation by serving as a driver for Usama bin Laden and other high ranking al Qaeda members and associates by transporting them to various locations in Afghanistan knowing and intending that by providing said service or transportation he was directly facilitating communication and planning used for an act of terrorism.

Specification 6.

23. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization engaged in hostilities against the United States, has engaged in or engages in terrorism, by intentionally providing material support or resources to al Qaeda, to wit: service or transportation to Usama bin Laden and other high ranking al Qaeda members and associates by transporting them to various areas in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for acts of terrorism.

Specification 7

24. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service as an armed body guard for Usama bin Laden, knowing and intending that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

Specification 8.

25. In that Hamdan did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaida, an international terrorist organization has engaged in hostilities against the United States, has engaged in or engages in terrorism, intentionally provide material support or resources, to al Qaeda, to wit: service as an armed body guard for Usama bin Laden by knowing that by providing said service as an armed body guard for Usama bin Laden he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

# APPENDIX F
# LORD GOLDSMITH, ATTORNEY GENERAL OF THE UNITED KINGDOM TO THE HOUSE OF DELEGATES MEETING OF THE AMERICAN BAR ASSOCIATION FEBRUARY 12, 2007

It is an honor and a pleasure to have been invited to address you today. The American Bar Association is a great organization admired and listened to by lawyers around the world. It is a privilege therefore to address you, the House of Delegates who represent the lawyers of America at the heart of the ABA.

It is also a pleasure because of the close ties between the American Bar Association and the legal profession in my country. Those links go back many years. In the Middle Temple, one of the great Inns of Court, for example, the generosity of the ABA in helping to rebuild the great Hall, badly damage in enemy action is commemorated. At Runnymede the ABA created a memorial to the signing of Magna Carta, the great charter whose principles underlie both our countries' legal and democratic systems. And over the years the ABA has celebrated its annual meetings in London from time to time. Most recently in the year 2000.

The millennium year was a symbolic year to celebrate our close legal traditions in this year. That celebration included the publication by the ABA of a collection of essays by American and British legal scholars and judges entitled *Common Law, Common Values, Common Rights*. I was privileged to be involved in that project which brought together great American judges such as Chief Justice Judith Kay of New York and Supreme Court Justice Anthony Kennedy and equivalent figures from our own judiciary.

Participating in the project brought home to me how very strong are our ties of the common law and of our common

democratic values. It was the common law in which the founding fathers of this country had confidence, brought by the settlers as part of their culture and adapted to suit the social and economic conditions of the New World.

You reflect that common heritage in the ABA's logo: "Defending Liberty and Pursuing Justice."

These are great and proper ideals which we share. They may not always be comfortable to pursue; it may mean defending clients whose conduct causes revulsion or whose causes are unpopular. But part of defending liberty and pursuing justice is to take on those cases too. Which is why so many who understand these principles were shocked — as I was — when it appeared that a senior Pentagon official was condoning criticism of firms prepared to take on the cases of some of those detained in Guantanamo Bay.

There is a long history in this country, as in mine, of lawyers defending those with unpopular causes without it being thought that the lawyers share the same views as their clients.

So John Adams, later to become second President of the USA, rose to this challenge when as a young lawyer he courted strong personal unpopularity and a major reduction in his practice to defend British soldiers involved in the Boston Massacre of 1770.

In the decision of the House of Lords in *Medcalf v. Weatherill* (2003) the House underlined the importance of this constitutional safeguard describing it as "too often taken for granted."

"Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalized or harassed whether by the Executive, the Judiciary or by anyone else."

I know that the Pentagon official involved has since apologized and resigned and his remarks repudiated by the Administration. I don't come to make any personal attack, but I assure you that remarks of that sort are viewed from across the Atlantic as unjust, unacceptable and un-American.

The ABA's logo encapsulates the ideals for which America has been renowned. Indeed America is a country with a proud tradition as a beacon of freedom, liberty and of justice — assisting my country to free Europe from tyrants in two world wars. American laws have been a model to which others have aspired.

And I am pleased to be able to pay tribute to the work that the ABA has done and supported, for example, by its sponsorship of support of the Central and Eastern European Law Initiative, the CEELI program to help bring stable and independent legal systems to countries emerging from communist dictatorship or torn by civil war. This too has been a model of the values the ABA stands for.

My country has worked too in these important areas, supporting countries, their judges and their lawyers to strengthen the rule of law; and to help build capacity to increase access to justice. There is much that has been done. I have been privileged to see some of it and to hear the benefits it has brought -- such as the help in training black lawyers in the new South Africa; or the help in rehabilitating prisoners I saw in the slums of Nairobi; or the teaching of principles of human rights law to the judges of Iraq trying to recreate a legal system in which the public can have confidence after 30 years of Baathism.

But I believe we can do more. Which is why we are creating new networks of legal assistance to bring together not only the work that is done by Government and lawyers in the public sector — but lawyers and judges in the private sector. I was privileged recently to chair the first meetings of coordinating committees to bring this into being; and to harness the expertise and wisdom of lawyers and judges with the development skills and resources of government.

I foresee the possibility of greater international cooperation too. We should look, for example, at ways to complement the work other countries and organizations, such as the ABA are doing in these fields. That could be a profitable

subject for greater discussion and, if there is interest I would be willing to take this forward.

But as well as sharing a great legal tradition, we share problems too.

One of the most profound, in my view, for our legal system has been how to balance the need to protect our national security and the lives of our citizens after the terrors of 9/11 and the outrages which have followed, including the London underground bombings of 7/7 with the need to protect our civil liberties.

I believe, and have long asserted, that governments have an obligation to protect both: our national security but also our fundamental human rights. Our societies are based on these values; on commitment to liberty and to the rule of law; to our democratic way of life; to freedom of expression and thought; freedom from arbitrary arrest and to fair trial. These liberties were hard fought by our ancestors over the years: from Magna Carta at Runnymede; in the Declaration of Independence and on the fields of battle of the Second World War. They are actually freedoms and liberties and values which the terrorists would destroy. This makes it all the more important that we continue to hold them dear and preserve them.

Striking this balance is not easy. For the threats from terrorism are large. We in my country have not found this easy. We have strengthened our criminal law to meet the conditions of modern terrorism; and we have invested significantly in our front law enforcement agencies and security and intelligence services.

I do not believe the threat that we face can be ignored. So it is right to consider whether changes to existing laws are needed. Indeed even the great human rights instruments of the world, such as the Universal Declaration of Human Rights — in Article 29 — and the European Convention of Human Rights — in many individual articles and in Article 15 particularly — recognize that some times rights have to be adjusted or exceptionally derogated from in the interests of the community more widely.

But this does not give an unlimited license it to throw away our values for the sake of expediency. It can only be undertaken in a principled way.

I would single out three principles.

First, we must respect the rule of law.

That means adhering to our domestic and international legal obligations. These cannot simply be ignored or set aside.

Respecting the rule of law means too subjecting executive action to the scrutiny of the democratic institutions but also of the courts. Judicial scrutiny is a key part of the rule of law. It was to us shocking that until the Supreme Court ruled otherwise in the *Rasul v. President Bush* decision it was thought appropriate to assert that the legality of detentions in a U.S. facility under U.S. control could not be the subject of consideration by the U.S. courts.

Second, it is essential to maintain the commitment to fundamental values and freedoms. That means that whilst there are some rights which are subject to adjustment to safeguard the rights of others — the right to privacy, for example, must allow for exceptions to help fight crime or preserve the legitimate rights of others — there are other rights which are non-negotiable.

The third principle is that in those cases where it is permissible to adjust the way that rights are protected to meet a new challenge or even to derogate from them, only those changes which are necessary to meet the new challenge — and not merely desirable — and which are proportionate to the challenge can be allowed.

The prohibition on torture is one such right on which I would say we should not compromise — one reason why Common Article 3 of the Geneva Conventions is such an important part of a civilized world. The right to a fair trial is another.

In this respect my view of the original Military Commissions for those detained at Guantánamo Bay are well known. Charged with my Prime Minister with considering whether they provided appropriate and sufficient guarantees of a

fair trial I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the U.K. — which ultimately they were.

I am aware of the changes that have now been made, following the Military Commissions Act signed into law late last year. I welcome some of the changes made — such as the removal of the possibility that detainees would be convicted on the basis of evidence heard in secret and that they had not seen or had a chance to contradict; and the amendments made in Senate to exclude evidence obtained by torture — though there remain some definitional questions of importance. But I am aware of criticisms that remain: of a law which treats aliens in a different way from American citizens; that still allows coerced evidence to be used in certain cases; that excludes the application of habeas corpus. And others. Some — perhaps all of these — will be the subject of further court challenges.

But, it would be misleading if I did not tell you my own view. I have previously stated my view that Guantánamo Bay is unacceptable and should close; it is a symbol of injustice that the long tradition of American justice and liberty ought to see removed at the earliest moment. I have not changed my view. The changes made are too little and too late. There remain fundamental problems with this system of detention. And the symbol remains.

In saying this, I am conscious that some will say that this is not for an outsider to say. That this is America's decision. I have increasingly been of the view that this is not so. I should explain why.

The struggle against global extremism and terrorism is one that ultimately we will not win by conventional means alone. We increasingly recognize in the United Kingdom that we will only win in the end if we can win the battle for ideas and values. We need to win this struggle at the level of values as much as force. In a major speech given in Los Angeles at last

summer, Prime Minister Tony Blair said that to win the war of values we must show that "our values are stronger, better and more just, more fair than the alternative" and that "we are even handed, fair and just in our application of those values to the world."

We have to show, against an al Qaeda narrative that all that the West does is designed to oppress Muslims, our values are actually those of justice, tough and fearless but fair, and of equality; of the democratic way of life; of the rule of law and of freedom. The presence of Guantanamo makes it so much more difficult to do this. For all of us.

So too in relation to other areas of our activity. We must show that our values of democracy, tolerance, acceptance of diversity and justice are strong. We in my country must also approach new laws as well as our public statements with the need to win this battle for ideas in mind.

This battle for ideas and values is then, in my view, of the greatest importance for our future. It is part of your function to uphold the values of the law and of our common law. I have great respect for this organization and I commend you in that responsibility and in meeting the commitment your motto makes clear: to defend liberty and pursue justice.

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued September 8, 2005 Decided February 20, 2007

No. 05-5062

Lakhdar Boumediene, Detainee, Camp Delta, et al.,
Appellants

v.

George W. Bush, President of the United States, et al.,
Appellees

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Consolidated with
05-5063

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Appeals from the United States District Court
for the District of Columbia
(No. 04cv01142)
(No. 04cv01166)

No. 05-5064

Khaled A.F. Al Odah, Next Friend of Fawzi Khalid
Abdullah Fahad Al Odah et al.,
Appellees/Cross-Appellants

v.

United States of America, et al.,
Appellants/Cross-Appellees

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Consolidated with
05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100,
05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106,
05-5107, 05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

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Appeals from the United States District Court
for the District of Columbia
(No. 02cv00828)
(No. 02cv00299)
(No. 02cv01130)
(No. 02cv01135)
(No. 02cv01136)
(No. 02cv01137)
(No. 02cv01144)
(No. 02cv01164)
(No. 02cv01194)
(No. 02cv01227)
(No. 02cv01254)

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Before: SENTELLE, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge*: Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the

Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* §1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443 (D.D.C. 2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063) - two cases involving seven detainees - Judge Leon granted the government's motion and dismissed the cases in their entirety. *See Khalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005).

In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush,* 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims - habeas and non-habeas - raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28

U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al Odah,* 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien - enemy or not - held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" *id.* at 1144 (quoting *Johnson v. Eisentrager,* 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

The Supreme Court reversed in *Rasul v. Bush,* 542 U.S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under § 2241. *See Rasul,* 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See Rasul,* 542 U.S. at 484-85. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> (1) an application for a writ of habeas corpus filed by or

> on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
>
> (A) is currently in military custody; or
>
> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit ... to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA § 1005(e)(2), (e)(3).

The following June, the Supreme Court decided *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim ... that is pending on or after the date of the enactment of this Act." DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide ... after having been presented with the option," the Court concluded "[t]he omission [wa]s an integral part of the statutory scheme." *Hamdan,* 126 S. Ct. at 2769.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended § 2241(e). The new amendment reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[1]

## I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.[2]

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[1] Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

[2] Without exception, both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending cases. *See, e.g.*, 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act .... This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10367 (statement of Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."); *id.* at S10403 (statement of Sen. Cornyn) ("[O]nce ... section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); *id.* at S10404 (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the

Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)" - which repeals habeas jurisdiction - applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all - **without exception**!" [3]

The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[ ]" to repeal habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 484

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provisions of that act. * * * Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future.... I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"); 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

[3] Congress has rarely found it necessary to emphasize the *absence* of exceptions to a clear rule. Indeed, the use of "without exception" to emphasize the word "all" occurs in only one other provision of the U.S.Code. *See* 48 U.S.C. § 526(a).

(1973).[4] Congress did not have to say that "the amendment made by subsection (a)" - which already *expressly* includes habeas cases - shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases.*" The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain

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[4] If section 7(b) did not include habeas cases among cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," it would be inconsistent with section 7(a). Section 7(a) of the MCA first repeals jurisdiction "to hear or consider an application for a writ of habeas corpus" by detainees. 28 U.S.C. § 2241(e)(1). It then repeals jurisdiction over "any *other* action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee, *id.* § 2241(e)(2) (emphasis added), thus signifying that Congress considered habeas cases as cases relating to detention, as indeed they are.

that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections - one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases - makes no legal difference.[5]

## II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 2, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the

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[5] The detainees suggest that federal courts retain some form of residual common law jurisdiction over habeas petitions. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 95 (1807), holds the opposite. *See Ex parte McCardle,* 74 U.S. 506 (1868). "Jurisdiction of the lower federal courts is ... limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701 (1982). The observations about common law habeas in *Rasul,* 542 U.S. at 481-82, referred to the practice in England. Even if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all "jurisdiction to hear or consider an application for a writ of habeas corpus" by a detainee, whatever the source of that jurisdiction.

In order to avoid "serious 'due process,' Suspension Clause, and Article III problems," the detainees also urge us not to read section 7 of the MCA to eliminate habeas jurisdiction over Geneva Convention claims. But that reading is unavoidable. Section 7 is unambiguous, as is section 5(a), which states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding ... as a source of rights in any court of the United States."

public Safety may require it."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr,* 533 U.S. at 301; *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 170 (1970). The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. In *Lockington's Case,* Bright. (N.P.) 269 (Pa.1813), a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate. The War of 1812 made Lockington an "enemy alien" under the Alien Enemies Act of 1798. Although he lost on the merits of his petition for habeas corpus before the Pennsylvania Supreme Court, two of three Pennsylvania justices held that he was entitled to review of his detention.[6] In *The Case of Three Spanish Sailors,* 96 Eng. Rep. 775 (C.P. 1779), three Spanish seamen had boarded a merchant vessel bound for England with a promise of wages on arrival. After arriving in England, the English captain refused to pay their wages and turned them over to a warship as prisoners of war. The King's Bench denied the sailors' petitions because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776. The detainees claim that, as in *Lockington's Case,* the King's Bench exercised jurisdiction and reached the merits. The third case - *Rex v. Schiever,* 97 Eng. Rep. 551 (K.B. 1759) - involved a citizen of Sweden intent on entering the English merchant trade. While at sea on an English merchant's ship, a French privateer took Schiever along with the rest of the crew as prisoners, transferred the crew to another French ship, and let

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[6] During this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention. The Supreme Court later held in *Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859), and *Tarble's Case,* 80 U.S. (13 Wall.) 397 (1871), that state courts had no such power.

the English prisoners go free. An English ship thereafter captured the French ship and its crew, and carried them to Liverpool where Schiever was imprisoned. From Liverpool Schiever petitioned for habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The court denied him relief because it found ample evidence that he was a prisoner of war. *Id.* at 552.

None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory.[7] The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ed.); 3 BLACKSTONE, COMMENTARIES 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching,* 56 T.L.R. 3, 5 (Vacation Ct.1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm"). Robert Chambers, the successor to Blackstone at Oxford, wrote in his lectures that the writ of habeas corpus extended only to the King's dominions. 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773 (composed in association with Samuel Johnson), at 7-8 (Thomas M. Curley ed., 1986). Chambers cited *Rex v. Cowle,* 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759), in which Lord Mansfield stated that "[t]o foreign dominions ... this Court has no power to send any writ of any kind. We cannot send a

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[7] The dissent claims that the difference between Schiever and the detainees is "exceedingly narrow," Dissent at 14, because Schiever was brought *involuntarily* to Liverpool. For this proposition, the dissent cites *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). *Verdugo-Urquidez* was a Fourth Amendment case. Obviously, it had nothing to say about habeas corpus in Eighteenth Century England.

habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] ... we may." Every territory that Mansfield, Blackstone, and Chambers cited as a jurisdiction to which the writ extended (e.g., Ireland, the Isle of Man, the colonies, the Cinque Ports, and Wales) was a sovereign territory of the Crown.

When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* HOLDSWORTH, *supra,* at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 127-28 (William S. Hein Co. 1989) (1827), which included access to habeas corpus, *see* DUKER, *supra,* at 51-53; HOLDSWORTH, *supra,* at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole,* 53 INT'L & COMP. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle,* Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* CHAMBERS, *supra,* at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without

presence or property within the United States.

*Johnson v. Eisentrager,* 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention,* 51 COLUM. L. REV. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager,* and that this difference is material for purposes of common law habeas.[8] They point to dicta in *Rasul,* 542 U.S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan,* "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States - or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul,* 542 U.S. at 475 - had a common law or constitutionally protected right to the writ of habeas corpus." *Hamdan v. Rumsfeld,* No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul,* 542 U.S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"), and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the

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[8] The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah,* 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

detainees' way,[9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah,* 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager.* There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world ... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender,

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[9] The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* HOLDSWORTH, *supra*, at 116-17; DUKER, *supra*, at 51-53. As noted, *supra*, these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.1) involved both extraterritorial detention and alien petitioners.

the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See* http://www.archives.gov/iwg/ declassified_records/oss_records_263_wilhelm_hoettl.html.)

Later Supreme Court decisions have followed *Eisentrager.* In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id* . at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez,* the Court - again citing *Eisentrager* - found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).[10]

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903.

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[10] The Rasul decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager.* Even if Rasul somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager. See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484-85 (1989).

*See Al Odah,* 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba - not the United States - has sovereignty over Guantanamo Bay. *See Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher,* 43 F.3d 1412 (11th Cir.1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown,* 335 U.S. at 380. Here the political departments have firmly and clearly spoken: "'United States,' when used in a geographic sense ... does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g).

The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac v. Porto Rico,* 258 U.S. 298, 312-13 (1922); *Dorr v. United States,* 195 U.S. 138, 148 (1904); *see also Ralpho v. Bell,* 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U.S. CONST., art. IV, § 3, cl. 2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch,* 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager,* we held in *Pauling v. McElroy,* 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in

this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U .S. Dep't of State,* 292 F.3d 797, 799 (D.C. Cir. 2002).[11]

As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. *See H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law ...." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly.

The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively,

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[11] The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution,* 95 GEO. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

[12] James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9 - next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 700-01 & n.437 (1999).

"people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States v. Lovett*, 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[13] "The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right*." Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 374 & n.227 (2006) (emphasis added).[14]

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[13] *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups ....") (citing *United States v. Brown*, 381 U.S. 437 (1965); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz v. Gabry*, 123 F.3d 909, 912 (6th Cir. 1997).

[14] *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV.

Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

## III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA § 1005(e)(2).[15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan*, they argued that we were without authority to do so.[16] Even if we have authority to

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251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

[15] *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

[16] *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions - not the subsequent CSRT decisions ...."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br.

convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

*So ordered.*

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Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

ROGERS, *Circuit Judge*, dissenting: I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore

void and does not deprive this court or the district courts of jurisdiction.

On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

## I.

Where a court has no jurisdiction it is powerless to act. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus - the MCA - and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

### A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may

require it." U.S. CONST. art. I, § 9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi v. Rumsfeld,* 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman,* 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[1]

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed."[2] The Supreme Court has construed the Attainder

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[1] The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See, e.g., United States v. Robel,* 389 U.S. 258, 263 (1967); *Gitlow v. New York,* 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman,* 8 U.S. (4 Cranch) at 95); *see also In re Barry,* 42 F. 113, 122 (C.C.S.D.N.Y.1844), *error dismissed sub nom. Barry v. Mercein,* 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that 'the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

[2] Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and

Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett,* 328 U.S. 303, 315 (1946). In *Lovett,* the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

> Our Constitution did not contemplate such a result. To quote Alexander Hamilton,
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> > * * * a limited constitution * * * [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

*Id.* at 314 (quoting THE FEDERALIST NO. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham,* 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and potentially vindictive legislation" and acknowledged that the clause "confin[es] the legislature to penal decisions with prospective effect." *See also Marbury,* 5 U.S. (1 Cranch) at 179-80; *Foretich v. United States,* 351 F.3d 1198, 1216-26 (D.C. Cir. 2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett,* 328 U.S. at 316, and cannot operate to

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therefore amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts - Constitutional Right or Legislative Grace?,* 40 CAL. L. REV. 335, 339 (1952).

divest a court of jurisdiction.[3]

The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[4] It is a truism, of course, that individual rights like those

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[3] The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a structural limitation on Congress. *See* Op. at 23 n.13. None of these cases makes the court's point. In *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver v. Graham,* 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver,* the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] ... one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

[4] For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers

found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. CONST. art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, *see* U.S. CONST. art. I, § 7, cl. 1; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 (1974) (finding no individual right under the Incligibility Clause).

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128-32 (1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., rev. ed. 1966). By the court's reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper

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of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons*, 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says nothing about the distinction, relevant here, between individual rights and limitations on Congress.

Clause); *see also, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (Taxing Clause).

The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n.11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension - and by the court's reasoning therefore limiting habeas corpus - to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84,* invoking William Blackstone,

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

THE FEDERALIST NO. 84, at 468 (E.H. Scott ed. 1898) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES * 131-32); *see also Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 125 (1866).

**B.**

This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul,* 542 U.S. at 483-84, the Supreme Court held that the federal district

courts had jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as "enemy combatants" by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. *See* 28 U.S.C. § § 2242-2253. After *Rasul,* Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf v. USI Film Prods.,* 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS v. St. Cyr,* 533 U.S. 289, 299 (2001); *Ex parte Yerger,* 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> (b) - EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the

> enactment of this Act *which relate to* any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. § 2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

The detainees suggest that by singling out habeas corpus in § 2241(e)(1) and by failing to do so in section 7(b) - and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in § 2241(e)(2) - Congress was expressing its intent to make the MCA retroactive only as to § 2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus is not "relating to any aspect of ... detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas § 2241(e)(1) refers to habeas corpus, § 2241(e)(2) deals with "any *other* action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

The question, then, is whether by attempting to eliminate

all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that "*at the absolute minimum,* the Suspension Clause protects the writ 'as it existed in 1789." ' *St. Cyr,* 533 U.S. at 301 (quoting *Felker v. Turpin,* 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution.[5] This proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *See United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (4th ed.2003).

**1.**

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is

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[5] It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus - either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment - or presumed the continued vitality of this "writ antecedent to statute," *Williams v. Kaiser,* 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C.1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of habeas corpus as it has developed since 1789. *Compare St. Cyr,* 533 U.S. at 304-05, *and LaGuerre v. Reno,* 164 F.3d 1035, 1038 (7th Cir.1998), *with Felker,* 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 COLUM. L. REV. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr,* without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[6] The paucity of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Rasul,* 542 U.S. at 482 (quoting *Ex parte Mwenya,* [1960] 1

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[6] The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra.*

Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors,* 2 Black. W. 1324, 96 Eng. Rep. 775 (C.P. 1779); *Rex v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon,* 9 GREEN BAG 2D 39 (2005) (reporting *United States v. Williams* (C.C.D. Va. Dec. 4, 1813)).

To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v. Schiever,* shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever,* 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[ ] against his will and inclination ... and treated him with so much severity[ ] that [his captor] would not suffer him to go on shore when in port ... but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was

carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B.1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager*, 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.*, 97 Eng. Rep. at 599-600. Through the use of ellipsis marks, the court excises the

qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as the court's reasoning implies, but rather "a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown,* 5 B. & S. 280, 122 Eng. Rep. 835 (K.B. 1864). And the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror,* 91 CORNELL L. REV. 497, 512-13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey, Jersey, Minorca,* or the *plantations,*" courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council,* the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (1938). *Cowle,* by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853-55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul,* 542 U.S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004,* 52 NAVAL L. REV. 118, 122-23

(2005).[7]

The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston,* 306 U.S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented

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[7] The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the foreign ship has "no exemption from the jurisdiction of the country into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching,* 56 T.L.R. 3 (K.B. Vacation Ct. 1939). In *Rasul,* the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person ... detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching,* 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul,* 542 U.S. at 483 n. 14; *Mwenya,* [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

common-law courts from exercising habeas jurisdiction in non-criminal matters such as the petitions in these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 CHAMBERS, *supra,* at 11; 9 HOLDSWORTH, *supra,* at 121.

Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson,* 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B. 1861), *superseded by statute,* 25 & 26 Vict., c. 20, § 1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95, 121 Eng. Rep. at 527-28; *see also Brown,* 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 112, 149, 151 (1967); *see also Rex v. Mitter,* Morton 210 (Sup. Ct., Calcutta 1781), *reprinted in* 1 THE INDIAN DECISIONS (OLD SERIES) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex v. Hastings,* Morton 206, 208-09 (Sup. Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 THE INDIAN DECISIONS, *supra,* at 1005, 1007; *id.* at 209 (opinion of Impey, C.J.); Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501, 2530 n.156 (2005).

Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager,* the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.*" 339 U.S. at 777. Thus *Eisentrager*

presented a far different question than confronts this court.[8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

**2.**

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy ... less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States,* 373 U.S. 1, 14 (1963).

The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States v. Hayman,* 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. § 2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or ineffective." *Id.* at 223. The Court came

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[8] To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul, see* 542 U.S. at 475-79.

to a similar conclusion in *Swain v. Pressley,* 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. CODE § 23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker,* 518 U.S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

These cases provide little cover for the government. As the Supreme Court has stated, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr,* 533 U.S. at 301. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

"Petitioners in habeas corpus proceedings ... are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant

facts." *Harris v. Nelson,* 394 U.S. 286, 298 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See, e.g.,* 28 U.S.C. § § 2243, 2248; *Bollman,* 8 U.S. (4 Cranch) at 125; *Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Schiever,* 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi,* 542 U.S. at 537-38 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[10] Moreover, these proceedings occur before a board of military judges subject to command influence, *see Hamdan,* 126 S. Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss v. United States,* 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. § 837(a). Insofar as each of these practices impedes the process of

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[9] At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See, e.g., Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Bushell's Case,* Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P. 1670). *But see* MCA § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman,* 342 U.S. at 210-11.

[10] With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to obtain evidence to support their claims that they are not enemies of the United States.

determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court's review of CSRT determinations, *see* DTA § 1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case - even assuming the detainee could learn of its contents - assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. *See generally* INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), *available at* http://www.fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits with abhorrence for over 500 years." *A. v. Sec'y of State*, [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.); *see also Hamdan*, 126 S. Ct. at 2786; *Jackson v. Denno*, 378 U.S. 368, 386 (1964); *Proceedings Against Felton*, 3 Howell's St. Tr. 367, 371 (1628) (Eng.); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73 (1977)

("Already in the fifteenth and sixteenth centuries, ... the celebrated Renaissance 'panegyrists' of English law were ... extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman,* 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra,* § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al., No-Hearing Hearings: CSRT: The Modern Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

**3.**

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. However, Congress has not invoked this power.

Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, ... to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900); *see Duncan v. Kahanamoku,* 327 U.S. 304, 307-08 (1946). *See also* DUKER, *supra,* at 149, 178 n.190.

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

**II.**

In *In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443 (D.D.C. 2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations - Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen - who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

> [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and ... the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

*Id.* at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002,[11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is

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[11] *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see Hamdan,* 126 S. Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin,* 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed.1920), the Geneva Conventions, *e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the Constitution, *see* U.S. CONST. art. I, § 8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi,* 519 U.S. at 519-20.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi,* 542 U.S. at 529-32 (plurality opinion); *see id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi,* the plurality acknowledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the premise underlying the conclusion that

there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g., Milligan,* 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. Const. art. I, § 9, cl. 2; *see* 2 STORY, *supra,* § 1342; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," DUKER, *supra,* at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis*") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case,* 3 Howell's St. Tr. 1, 59 (K.B. 1627); MEADOR, *supra,* at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason. *See, e.g., Hamdan,* 126 S. Ct.

at 2773; *cf. Hamdi,* 542 U.S. at 521.

Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman,* the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U.S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex v. Schiever,* discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever,* the court reviewed the prisoner's affidavit and took further testimony from a witness, who "sw[ore] that Schiever was forced against his inclination ... to serve on board [the French privateer]." 2 Burr. at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.,* 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors,* 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case,* 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P. 1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010.

In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States v. Williams* (C.C.D. Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag,* Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the regulations

made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra,* at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case,* 1 Brightly's (N.P.) 269 (Pa. 1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g., Eisentrager,* 339 U.S. 763; *In re Yamashita,* 327 U.S. 1 (1945); *Quirin,* 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee - who could be held indefinitely without even the prospect of a trial or meaningful process - from that of a convicted war criminal. *See Rasul,* 542 U.S. at 476; *Omar v. Harvey,* No. 06-5126, slip op. at 13 (D.C. Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita,* the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. PIERCE O'DONNELL, IN TIME OF WAR 152-53, 165-66, 189 (2005). In *Eisentrager,* 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the

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[12] Prior to *Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859), and *Tarble's Case,* 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

military tribunal cases.[13]

The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing

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[13] There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* §§ 3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* § 1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

*Id.* § 1-6g. In *Hamdi*, the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.*, The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 PUB. PAPERS 121, 123 (Jan. 28, 2002).

vitality of *Eisentrager*, 542 U.S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager* 's constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U.S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi*, 542 U.S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* MEADOR, *supra*, at 18; *see also Hamdi*, 542 U.S. at 525-26.

Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* § 2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi*, 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* § 2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* § 2246. The district court may conduct discovery. *See Harris*, 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice

require."[14] District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases,* 355 F. Supp. 2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

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[14] Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases,* 355 F. Supp. 2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see id.* at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are cognizable in habeas. *Compare Khalid,* 355 F. Supp. 2d at 324-25, *with Miller v. Overholser,* 206 F.2d 415, 419-21 (D.C. Cir. 1953). Congressional action may also clarify matters. *See, e.g.,* S. 185, S. 576, 110th Cong. (2007).

## APPENDIX H
## NOTIFICATION OF THE SWEARING OF CHARGES

**DEPARTMENT OF DEFENSE**
**OFFICE OF THE CHIEF PROSECUTOR**
**OFFICE OF MILITARY COMMISSIONS**
**1610 DEFENSE PENTAGON**
**WASHINGTON, DC 20301-1610**

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the _____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

*(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)*

**AFFIDAVIT OF NOTIFICATION**

I hereby certify that a copy of this document was provided to the named detainee this ___ day of _____, 2007.

| | |
|---|---|
| _____ | _____ |
| Signature | Organization |
| _____ | _____ |
| Typed or Printed Name and Grade | Address of Organization |

| CHARGE SHEET |
|---|
| **I. PERSONAL DATA** |
| **1. NAME OF ACCUSED:**<br>Omar Ahmed Khadr |
| **2. ALIASES OF ACCUSED:**<br>Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali |
| **3. ISN NUMBER OF ACCUSED (LAST FOUR):**<br>0766 |
| **II. CHARGES AND SPECIFICATIONS** |
| **4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.**<br><br>**SPECIFICATION:**<br><br>See Attached Charges and Specifications. |

| III. SWEARING OF CHARGES | | |
|---|---|---|
| **5a. NAME OF ACCUSER** *(Last, First, MI)*<br><br>TUBBS II, MARVIN, W. | **5b. GRADE**<br><br>O-4 | **5c. ORGANIZATION OF ACCUSER**<br><br>Office of the Chief Prosecutor, OMC |
| **5d. SIGNATURE OF ACCUSER**<br><br>s/ Marvin Tubbs | | **5e. DATE (YYYYMMDD)**<br><br>20070202 |

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

| | |
|---|---|
| Jeff Groharing<br>*Typed Name of Officer* | Office of the Chief Prosecutor, OMC<br>*Organization of Officer* |
| O-4<br>*Grade* | Commissioned Officer, U.S. Marine Corps |
| s/Jeffrey D. Groharing<br>*Signature* | *Official Capacity to Administer Oath (See R.M.C. 307(b) must be commissioned officer)* |

| IV. NOTICE TO THE ACCUSED | |
|---|---|
| 6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308). | |
| Jeff Groharing, Major, U.S. Marine Corps | Office of the Chief Prosecutor, OMC |

| *Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges* | *Organization of the Person Who Caused Accused to Be Notified of Charges* |
|---|---|
| _____ *Signature* | |

**V. RECEIPT OF CHARGES BY CONVENING AUTHORITY**

7. The sworn charges were received at ___ hours, on _____, at _____.
*Location*

For the Convening Authority:

_____
*Typed Name of Officer*

_____
*Grade*

_____
*Signature*

**VI. REFERRAL**

| **8a. DESIGNATION OF CONVENING AUTHORITY** | **8b. PLACE** | **8c. DATE** (YYYYMMDD) |
|---|---|---|
| | | |

Referred for trial to the (non)capital military commission convening order: _____
_____.
_____subject to the following instructions[1]: _____
_____

By _____ of _____
*Command, Order, or Direction*

| _____ *Typed Name and Grade of Officer* | _____ *Official Capacity of Officer Signing* |
|---|---|

| |
|---|
| _____<br>*Signature* |
| **VII. SERVICE OF CHARGES** |
| 9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.<br><br>_____ _____<br>*Typed Name of Trial Counsel* *Grade of Trial Counsel*<br><br>_____<br>*Signature of Trial Counsel* |
| **FOOTNOTES** |
| [1] See R.M.C. 601 concerning instructions. If none, so state. |

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>v.<br><br>OMAR AHMED KHADR<br>a/k/a "Akhbar Farhad"<br>a/k/a "Akhbar Farnad"<br>a/k/a "Ahmed Muhammed Khali" | CHARGES<br><br>Murder in Violation of the Law of War<br><br>Attempted Murder in Violation of the Law of War<br><br>Conspiracy<br><br>Providing Material Support for Terrorism<br><br>Spying |

## INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

## JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

## BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al

Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents. Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

## GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

16. Al Queda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he

called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the America Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

**CHARGE I: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR**

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

**CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR**

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

**CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY**

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

**CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM**

30. Specification 1: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an

armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

**CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING**

34. Specification: In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to

convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

# OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 29 2007
OFFICE OF THE CLERK

No. 06-1169

# In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

*v.*

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

OMAR KHADR, PETITIONER

*v.*

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the unusual petition for certiorari in this case is authorized under this Court's rules, including Rule 12.4.

2. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas corpus petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

3. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

4. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

5. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, § 1001 *et seq.*, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-16a) dismissing Hamdan's petition for a writ of habeas corpus is reported at 464 F. Supp. 2d 9. The opinion of the court of appeals (Pet. App. 52a-102a) dismissing Khadr's petition for a writ of habeas corpus is reported at 476 F.3d 981. The opinion of the district court relating to Khadr is reported at 355 F. Supp. 2d 443.

## JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petition for a writ of certiorari was filed on February 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

## STATEMENT

Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba. Their detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are properly detained as enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters.

1. a. Petitioner Hamdan, a Yemeni national, was captured in Afghanistan in November 2001 and then transported to the Guantanamo Bay Naval Base in Cuba. Pet. App. 1a. At Guantanamo Bay, Hamdan was given a formal adjudicatory hearing before a CSRT, which determined that he is an enemy combatant. Indeed, Hamdan has admitted that he was a personal assistant to Osama bin Laden. For purposes of the CSRT, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006) (quoting Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004)).

In July 2003, acting pursuant to an executive order providing for the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States, see *Deten-*

*tion, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001), the President designated Hamdan for trial before a military commission. See *Hamdan*, 126 S. Ct. at 2760. Hamdan was charged with a conspiracy to commit attacks on civilians and civilian objects, murder by an unprivileged belligerent, and terrorism. *Id.* at 2761. The charge was based on his direct connection as bodyguard and driver to Osama bin Laden, and his participation in al Qaeda's campaign of international terrorism against the United States, including transporting weapons for al Qaeda. *Ibid.*

b. Hamdan filed a petition for habeas corpus and/or mandamus, alleging in relevant part that the President lacks authority to try him before a military commission, rather than by a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and that the military-commission procedures violate the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention). See *Hamdan*, 126 S. Ct. at 2759. The district court granted Hamdan's habeas petition and stayed the military-commission proceedings. See *id.* at 2761. The court of appeals reversed, and this Court granted review. See *id.* at 2762.

c. While Hamdan's case was pending in this Court, Congress enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, § 1001 *et seq.*, 119 Stat. 2739. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the Act provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. DTA § 1005(e)(3)(A), 119 Stat. 2743.

d. This Court held that Section 1005(e)(1) of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *Hamdan*, 126 S. Ct. at 2762-2769. On the merits, the Court further held that the military commission convened to try Hamdan for conspiring to violate the laws of war could not proceed because it was not authorized by Congress. See *id.* at 2772-2798.

e. In the wake of this Court's decision, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2636, amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy com-

batant or is awaiting such determination." Section 7(a) also removes federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." *Id.* § 7(b), 120 Stat. 2636.

The MCA also established a detailed regime governing the establishment and conduct of military commissions, creating within the Uniform Code of Military Justice a chapter on "Military Commissions." See MCA § 3, 120 Stat. 2600-2631 (creating 10 U.S.C. ch. 47A). That chapter establishes requirements for military commissions distinct from and in the place of the UCMJ court-martial provisions. See *id.* § 4, 120 Stat. 2631 (amending various provisions of the UCMJ pertaining to courts-martial to make clear that they do not apply to military commissions under the MCA).

f. On remand, the district court held that the MCA removes federal jurisdiction over Hamdan's habeas case, and it dismissed his petition for lack of subject-matter jurisdiction. Pet. App. 1a-16a. The court held that the MCA was intended to remove statutory jurisdiction over habeas petitions filed by aliens detained as enemy combatants. *Id.* at 3a-5a. The court further held that Congress did not intend the MCA to suspend any constitu-

tional right to the writ of habeas corpus, *id.* at 5a-11a, but concluded that Hamdan, as an alien captured and detained outside the sovereign territory of the United States, has no constitutional rights under the Suspension Clause, *id.* at 11a-15a. Accordingly, the court concluded it was without jurisdiction and dismissed petitioner's habeas petition. *Id.* at 15a-16a.

Hamdan filed a notice of appeal from the district court's dismissal of his petition, Pet. App. 30a-31a, but moved to hold his appeal in abeyance pending the court of appeals' resolution of *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir.), and *Al Odah* v. *United States*, No. 05-5064 (D.C. Cir.). Mot. to Hold Appeal in Abeyance, No. 07-5042 (D.C. Cir. filed Feb. 6, 2007). His case remains in the court of appeals.

g. On February 2, 2007, new charges were sworn against Hamdan under the MCA, charging him with conspiracy and providing material support for terrorism. Pet. App. 32a, 38a-44a.

2. a. Petitioner Khadr, a Canadian national, was seized in Afghanistan in July 2002. Pet. App. 108a-110a. He was transferred to Guantanamo Bay, where a CSRT confirmed his status as an enemy combatant, based its determination that he is "a member of, or affiliated with, al Qaida." See Factual Return, Unclassified Summary of Evidence for CSRT (D.D.C. filed Sept. 15, 2004) (No. 04-CV-1136). Evidence presented to the CSRT included Khadr's admissions that he (1) threw a grenade that killed a U.S. soldier during the battle in which he was captured; (2) attended an al Qaeda training camp in Kabul, Afghanistan, which included weapons training; and (3) worked as a translator for al Qaeda to coordinate land mine missions as acts of terrorism. *Ibid.* In addition, evidence was presented that Khadr had partici-

pated in military operations against U.S. forces, including conducting surveillance at an airport near Khost to collect information on U.S. convoy movements, and planting ten land mines against U.S. forces in the mountain region between Khost and Ghardez, where U.S. convoys travel. *Ibid.*

In July 2004, a next friend filed a habeas corpus petition on Khadr's behalf. The petition was consolidated in the district court with the habeas corpus petitions of other Guantanamo Bay detainees, and the government moved to dismiss those petitions. The district court granted the motion in part and denied it in part, concluding that the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient under the Due Process Clause. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464, 468-478 (D.D.C. 2005). The district court certified its decision for interlocutory appeal.

b. In 2005, the President designated Khadr for trial by military commission, and the government charged petitioner. Military-commission proceedings began in January 2006 but were terminated upon this Court's decision in *Hamdan*. On February 2, 2007, new charges were sworn against Khadr under the MCA, including charges of murder, attempted murder, and providing material support for terrorism. Pet. App. 103a, 112a, 114a-115a.

c. The court of appeals dismissed the detainees' habeas cases, including that of Khadr, for lack of jurisdiction. See *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196; Pet. App. 52a-102a. The court held that the MCA applies to the detainees' pending habeas cases—each of which "relates to an 'as-

pect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," *id.* at 58a—and thus removes federal court jurisdiction over their petitions, *id.* at 58a-61a. The court rejected petitioners' argument that Section 7(b)'s effective-date provision applies only to non-habeas detention-related cases specified in Section 7(a) (28 U.S.C. 2241(e)(2)). Pet. App. 58a-60a. The court explained that Section 7(b) specifies the effective date of Section 7(a), which removes federal jurisdiction over *both* habeas and all other detention-related claims in "all cases, without exception." *Id.* at 59a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two reasons. First, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under that clause. Pet. App. 66a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if petitioners had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 62a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 64a-65a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 65a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has

been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Ibid.* (quoting *Eisentrager*, 339 U.S. at 768).

The court of appeals held that petitioners' reliance on this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), was misplaced. Pet. App. 65a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 67a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA removes jurisdiction in petitioners' cases, the court vacated the district court's decision and dismissed the cases for want of jurisdiction. Pet. App. 71a-72a.

Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 73a.

## ARGUMENT

The extraordinary petition for a writ of certiorari and a writ of certiorari before judgment here combines the cases of two different petitioners who are parties to two separate cases in different procedural postures be-

low, and who have raised different claims.[1] For one petitioner (Hamdan), petitioners seek a writ of certiorari before judgment. For the other petitioner (Khadr), petitioners seek review of a judgment that is already the subject of petitions for writs of certiorari pending before this Court in *Boumediene*, No. 06-1195, and *Al Odah*, No. 06-1196. Khadr was represented by the lawyers for the *Boumedine* detainees in the court of appeals and did not join with Hamdan until the unusual petition filed in this Court. There is no reason to grant petitioners' requests. The petition should be denied or, in the alternative, held pending *Boumediene* and *Al Odah*.

Hamdan seeks a writ of certiorari before judgment to review the district court's decision dismissing his habeas petition for lack of jurisdiction. This Court's rules make clear that such a petition "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. That exceptionally high threshold is not remotely met here.

Hamdan is unable to show irreparable harm of a nature that would warrant immediate review. He can pursue any challenge to his detention (or any subsequent conviction by a military commission) under the exclusive judicial review procedures established by the MCA and DTA, and the basic issues raised by the petition are al-

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[1] As discussed below, the peculiar "joint" petition for a writ of certiorari in this case does not satisfy the terms of Supreme Court Rule 12.4. At a minimum, there is a serious question as to whether the petition is appropriate under that rule. That question, which the Court would have to resolve, provides an additional and independently sufficient reason to deny review. See pp. 22-23, *infra*; see also Opp. to Mot. to Expedite 4-5.

ready pending before the Court in *Boumediene* and *Al Odah*. To the extent that Hamdan seeks to raise different issues from those presented by *Boumediene* and *Al Odah*, those issues should be presented to the court of appeals in the first instance and, in any event, are meritless. Nor is Hamdan entitled to have this Court review his petition under the standard applicable to a petition for a writ of certiorari *after* judgment, see Sup. Ct. R. 10, simply by attaching his petition to that of Khadr; indeed, there is serious doubt as to whether his attempt to do so is even authorized by this Court's rules. Thus, Hamdan's petition for a writ of certiorari before judgment should be denied. That is true even if this Court were to grant the petition for a writ of certiorari as to Khadr.

Khadr's petition for a writ of certiorari to review the judgment of the court of appeals should also be denied. For the reasons set out in our brief in opposition to the petition for a writ of certiorari in *Boumediene*, No. 06-1195, and *Al Odah*, No. 06-1196 (filed Mar. 21, 2007), the issues raised by the petition do not warrant this Court's review at this time. In the DTA, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention, as well as of any convictions by military commissions, should they occur. DTA § 1005, 119 Stat. 2740-2744. Petitioners contend that this review mechanism is deficient in various respects, but their claims are not ripe because petitioners have not even attempted to pursue review under the DTA. An effort to seek DTA review would not only allow petitioners to challenge the scope of review available under the DTA but also give concrete guidance as to the extent of that review. As in *Boumediene* and *Al Odah*, there is

no need for this Court to assess the adequacy of DTA review before it has even taken place.

In any event, if this Court were to grant review in *Boumediene* and *Al Odah*, Khadr—a party to the *Boumediene* case—presumably would be permitted to file a brief as a respondent supporting petitioners in those cases, raising any arguments that are properly presented by those cases. In addition, Hamdan would be free to file an amicus brief presenting any additional perspective that he believes that the Court should have in deciding those cases. Therefore, even if the Court were to grant review in *Boumediene* and *Al Odah*, there would be no reason to grant this extraordinary petition and, to the extent that petitioners seek to raise different issues than those presented in *Boumediene* and *Al Odah*, to further complicate the task before the Court.

1. As respondents explained in detail in the brief in opposition to the petition for a writ of certiorari in *Boumediene* and *Al Odah*, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court's holding that the MCA removes jurisdiction over the detainee's habeas actions was unanimous and is compelled by the plain language of the statute. See Br. in Opp. at 9-12 *Boumediene, supra* (No. 06-1195). Relying on the settled precedent of this Court, the court of appeals also correctly held that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, the detainees have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants. See *id.* at 19-28.

Congress has afforded petitioners—aliens detained at Guantanamo Bay as confirmed enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters—an unprecedented degree of access to our courts in wartime. No other captured enemy combatants in the history of this country, or any other, have enjoyed such privileges. The court of appeals has correctly concluded that the detainees must exercise their statutory right of judicial review through the procedures established by Congress. Petitioners have failed to demonstrate a sufficiently compelling basis for this Court to review the court of appeals' decision—or, in Hamdan's case, the district court's decision—before they have even attempted to invoke the procedures that Congress has afforded. And, in any event, any review in this Court should await a case in which a detainee has actually invoked his right of judicial review under the DTA, and in which this Court may consider the judicial review available under the DTA on a developed and concrete record, rather than in the abstract.

If this Court does grant review in *Boumediene* and *Al Odah*, then it may be appropriate to hold this petition pending the disposition of those cases. But as we explain below, whether or not this Court grants review in *Boumediene* and *Al Odah*, there is no occasion to grant certiorari and hear these cases on the merits.

2. Hamdan's petition does not satisfy the extraordinarily high standard for granting a petition for a writ of certiorari before judgment. See Sup. Ct. R. 11.

a. Hamdan does not even allege that any irreparable harm will result as a consequence of waiting to seek certiorari after the court of appeals reviews the district court's dismissal of his habeas petition. Particularly in

light of Hamdan's ability to seek review under the DTA and the MCA, Hamdan cannot demonstrate any irreparable harm from the delay of his habeas action.

Under the DTA, Hamdan may seek review in the D.C. Circuit of the CSRT's determination that he is an enemy combatant. See DTA § 1005(e)(2), 119 Stat. 2741-2742. Section 1005(e)(2)(C) of the DTA specifies the D.C. Circuit's "[s]cope of review" of the CSRT's enemy combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. The court also must consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C)(ii), 119 Stat. 2742. Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

In addition, if Hamdan is convicted by a military commission, he may seek review under the DTA of that final conviction. See DTA § 1005(e)(3), 119 Stat. 2743. The D.C. Circuit will review the final conviction to determine whether it was consistent with the applicable standards and procedures, and with federal law and the Constitution, to the extent that they apply. *Ibid.*

Thus, the MCA and DTA, while removing habeas jurisdiction, afford Hamdan an unprecedented level of

judicial review for an alien captured as an enemy combatant during an armed conflict. As part of that DTA review, Hamdan can challenge the lawfulness of the CSRT process or military-commission proceeding. The scope of DTA review is greater than that traditionally afforded in habeas review of convictions for war crimes by a military commission. As this Court has explained, habeas review in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military commission had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J. dissenting) (extent of review "is of most limited scope"); cf. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").

Under *Yamashita*, habeas review encompassed only the threshold jurisdictional question whether the offense and offender were triable by military commission. 327 U.S. at 8. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency—all of which the DTA and MCA permit. See DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Review under the DTA is also fully consistent with traditional habeas practice outside the military tribunal context. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not

review the factual determinations made by the Executive." *Id.* at 305-306. Accordingly, petitioner cannot claim any irreparable harm in having to seek review under the MCA and DTA, rather than through habeas, while he waits for the court of appeals to review the district court's dismissal of his habeas action.

Furthermore, Congress has now made clear its preference that review of the military-commission process take place like review of most criminal proceedings, that is, on appeal from a judgment of conviction. See MCA § 9. In its decision invalidating the earlier military-commission system, this Court emphasized the lack of "specific congressional authorization." *Hamdan*, 126 S. Ct. at 2775; see *id.* at 2799 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' * * * Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *ibid.* (Kennedy, J., concurring) ("Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches."). Congress's actions in joining with the Executive Branch to provide a military-commissions process reflecting the considered judgments of both political Branches of government have greatly reduced any asserted need for this Court's review, much less the need for expedited review before any commission proceedings have even begun. See *Schlesinger* v. *Councilman*, 420 U.S. 738, 754-755 (1975).[2]

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[2] In a letter sent to the Clerk after the petition for a writ of certiorari was filed, Hamdan asserts that a guilty plea entered by one of the petitioners in *Al Odah*, David Hicks, will preclude consideration of challenges to the military-commission scheme. See Letter from Neal

b. Petitioners argue (Pet. 7) that "[t]he scope of habeas jurisdiction is a matter of profound national and international importance," counseling in favor of this Court's immediate review. That consideration by itself is insufficient to "justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. As respondents explained in the brief in opposition to the petition for a writ of certiorari in *Boumediene* and *Al Odah*, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention and any criminal conviction. See *Boumediene* Br. in Opp. at 12-19. And the

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Katyal, Counsel of Record, to the Honorable William K. Suter, Clerk of the Court (Mar. 28, 2007) (*Letter*). That guilty plea has not yet been accepted by the military-commission judge. Whether or not Hicks's petition remains live or is withdrawn or mooted, and whether or not the Court grants this extraordinary petition, Khadr remains a party to the judgment in *Boumediene* and *Al Odah*. What precludes either Hicks or Kahdr from specifically raising unique issues about the MCA as it applies to detainees awaiting a military-commission trial is that those issues were neither pressed nor passed on below. Granting this extraordinary petition will not change that fact. Granting certiorari before judgment in *Hamdan* will put those issues before the Court, but without the benefit of consideration by the court of appeals. In all events, Hamdan does not satisfy the standards for certiorari before judgment, and no purpose would be served by injecting collateral, but relatively undeveloped, issues into the consideration of *Boumediene* and *Al Odah*.

Hamdan also asserts that, because the D.C. Circuit has stayed proceedings pending the disposition of his petition for a writ of certiorari, "there is no prospect of any prompt development in the Court of Appeals on the questions presented by this Petition." *Letter*. That statement is correct but incomplete. The D.C. Circuit stayed proceedings in Hamdan's case, but it did so at Hamdan's request. See Mot. to Hold Appeal in Abeyance (D.C. Cir. filed Feb. 6, 2007) (No. 07-5042). Hamdan can hardly complain that the court of appeals granted his motion.

exclusive judicial review procedures established by Congress exceed any judicial review that any captured enemy combatants have enjoyed in wartime. Petitioners demonstrate no compelling basis for this Court to review the court of appeals' decision before petitioners have even attempted to invoke the procedures that Congress has afforded.

Petitioners contend that this Court has previously granted certiorari before judgment in similar cases that involve important issues requiring prompt resolution, but those cases are inapplicable here. See Pet. 10 (citing cases). Several of the cited cases are ones in which the government sought or acceded to a request for certiorari before judgment because the Executive determined that the district court's decision would affect the government's interests or the national security in such a way so as to require this Court's immediate intervention. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 686 (1974); *Wilson* v. *Girard*, 354 U.S. 524 (1957); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (per curiam). The Executive, unlike a private litigant, has the responsibility to oversee this Nation's foreign relations and undertake military operations in an ongoing international armed conflict, and is, therefore, uniquely positioned to make such a determination.

In both *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), and *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), on which petitioners rely, the Court granted certiorari before judgment where the district court's order, if affirmed, would have resulted in a circuit split. The district court's decision in *Hamdan*, however, is entirely consistent with the D.C. Circuit's decision in *Boumediene*. In addition, in *Dames & Moore* the Court

determined that certiorari before judgment was appropriate because resolution of the relevant issue would affect a number of pending cases in various lower courts. See *Dames & Moore*, 453 U.S. at 660 (noting "lower courts had reached conflicting conclusions on the validity of the President's actions"); see also *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment to determine constitutionality of sentencing guidelines where there was "disarray among the Federal District Courts"). That is not the case here. And although this Court granted certiorari before judgment in *Ex parte Quirin*, *supra*, the petitioners there faced imminent execution. Hamdan does not face such a fate.[3]

Moreover, none of the cases cited by Hamdan involved situations where this Court had before it petitions for writs of certiorari that presented the same threshold issues seeking review of a court of appeals decision. Whatever the merits of Hamdan's request for certiorari before judgment in the abstract, his request is seriously undermined by the pending petitions in

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[3] While these cases in which the Court has granted certiorari before judgment are clearly distinguishable, the most apposite precedent is the Court's rejection of Hamdan's earlier effort to seek certiorari before judgment. See *Hamdan* v. *Rumsfeld*, 543 U.S. 1096 (2005) (No. 04-702). Indeed, despite the obvious importance of the novel questions raised in the context of the war on terror, this Court has routinely declined efforts to seek certiorari before judgment or in other interlocutory postures. See, *e.g.*, *Qassim* v. *Bush*, 126 S. Ct. 1771 (2006) (No. 05-892); *Padilla* v. *Hanft*, 545 U.S. 1123 (2005) (No. 04-1342); see also *In re Paracha*, 127 S. Ct. 1298 (2007) (No. 06-8449) (petition for writ of mandamus); *Moussaoui* v. *United States*, 544 U.S. 931 (2005) (No. 04-8385) (petition for writ of certiorari to review decision of court of appeals in interlocutory appeal).

*Boumediene* and *Al Odah*. At a minimum, those cases present the same threshold questions as Hamdan's case.

c. Contrary to petitioners' assertion (Pet. 8-9), this petition is not a necessary counterpart to *Boumediene* and *Al Odah*. The fact that petitioners here are subject to trial by military commission does not make their cases distinguishable from that of the detainees in *Boumediene* and *Al Odah*. Both Hamdan and Khadr are aliens detained as enemy combatants at Guantanamo Bay and are therefore in exactly the same position as the detainees in *Boumediene* and *Al Odah* insofar as they challenge their detention as enemy combatants, or the application of the jurisdiction-removing provision of the MCA to their cases. Petitioners provide no reason why the reasoning of the court of appeals' decision would not apply to them. Indeed, despite Khadr's protestation that he is differently situated, he filed the same brief and made the same arguments before the D.C. Circuit as the other *Al Odah* detainees. He made no arguments based on the fact that he was likely to be charged before a military commission, and he concedes (Pet. 6-7) that the arguments he advances here were not raised in *Boumediene* and *Al Odah*. Thus, it comes as no surprise that the court of appeals' opinion treated his case the same as the cases of the other detainees. As one of the petitioners in the *Al Odah* appeals, he is expressly covered by the court of appeals' judgment in that case; retaining new counsel and joining a petition filed on behalf of a detainee who was not a part of his case does not give him any license to make arguments concerning commission detainees that he did not properly raise in *Al Odah*.

Thus, even if the Court grants review in *Boumediene* and *Al Odah*, there is no reason for the Court to grant review in this case, which raises the same legal issues,

particularly insofar as a grant of certiorari would require the extraordinary step of granting review before judgment. That is particularly true given that, if the Court were to grant in *Boumediene*, Khadr presumably still could file a brief as a respondent in support of petitioners.

Petitioners contend that their petition raises legal issues beyond those presented and decided in *Boumediene* and *Al Odah*, see Pet. 9 (raising constitutional challenges to the MCA under the Bill of Attainder and Equal Protection guarantees), necessitating this Court's review in this case. Those arguments are at the periphery of the legal challenges raised to the MCA. In any event, the court of appeals in *Boumediene* and *Al Odah* determined that Guantanamo Bay detainees, as aliens detained outside the sovereign territory of the United States, lack constitutional rights. Pet. App. 66a. That holding forecloses petitioners' far-fetched claim that the MCA violates the Constitution's prohibition on bills of attainder or its guarantee of equal protection.

To the extent that the court of appeals' decision did not decide the specific constitutional issues that petitioners wish to raise at this time (or effectively interject into *Boumediene* and *Al Odah*), that fact counsels against this Court's grant of certiorari. The Court should not resolve those claims in the first instance but should wait for the benefit of an opinion from the court of appeals.[4]

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[4] In any event, petitioners' claims lack merit. Section 7 of the MCA does not contain either of the required elements of a bill of attainder: it neither singles out petitioner nor does it impose punishment. 120 Stat. 2635-2636. The MCA does not apply "either to named individuals or to easily ascertainable members of a group." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946); see *Foretich* v. *United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("Both 'specificity' and 'punishment' must be

d. Finally, Hamdan may not avoid his burden to demonstrate extraordinary circumstances warranting certiorari *before* judgment by latching onto Khadr.

As an initial matter, it is not clear that the petitions of Hamdan and Khadr are properly joined under this Court's Rule 12.4. That rule, in relevant part, provides that, "[w]hen *two or more judgments* are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices." (emphasis added). Here, however, there is only one judgment—that entered in *Boumediene* and *Al Odah*—since Hamdan petitions for a writ of certiorari before judgment. This Court's rules do

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shown before a law is condemned as a bill of attainder."). Rather, Section 7 of the MCA is a jurisdictional provision that applies to an open-ended class of individuals: aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations. MCA § 3, 120 Stat. 2600-2631. Moreover, that provision simply specifies the forum in which permissible claims by enemy combatants must be brought and clarifies the scope of that review. It does not impose any of the types of punishment that this Court has found to be covered by the Bill of Attainder Clause. See *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977). Even assuming Hamdan has constitutional rights under the Fifth Amendment, his equal-protection claim likewise fails. The MCA does not deprive aliens of any fundamental constitutional habeas right, because even if aliens held outside the Untied States as enemy combatants have a constitutional right to habeas, the MCA provides adequate and appropriate substitute relief. Further, Hamdan is not a member of a suspect class—federal classifications on the basis of alienage are subject only to rational-basis review. See *Matthews* v. *Diaz*, 426 U.S. 67 (1976).

not authorize combining a petition for a writ of certiorari before judgment with a petition for a writ of certiorari.

Moreover, although Khadr is permitted to file a petition separate from the other petitioners in *Al Odah*, see Sup. Ct. R. 12.4 ("Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari."), Hamdan cannot avail himself of the lower standard governing certiorari after judgment simply by combining his petition with that of Khadr. Because Hamdan fails to demonstrate extraordinary circumstances warranting certiorari before judgment, the petition should be denied as to him.

3. For the reasons set forth in our brief in opposition in *Boumediene*, the petition should also be denied as to Khadr. Khadr has presented no "compelling reasons" that distinguish him from the petitioners in *Boumediene* and warrant this Court's immediate review.

Petitioners complain that review of military-commission convictions under the DTA and MCA is not an adequate substitute for habeas for a number of reasons. These arguments add little to the arguments that have already been presented by the petitioners in *Boumediene* and *Al Odah* and that could be considered by the Court if it were to grant review in those cases. In any event, petitioners' arguments lack merit.

First, petitioners contend (Pet. 21) that habeas review permits pre-trial claims, whereas review under the DTA and MCA is limited to review of final convictions. This claim lacks merit. In the absence of clear statutory direction, courts have a limited equitable discretion to abstain from pre-trial review. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). But Congress can, as it has here, jurisdictionally bar a party's claims until an administrative or military ruling becomes final. See

*McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992); *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001). In *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994), the Court explained, "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history." In the MCA, the intent of Congress is clear to remove jurisdiction over the charged detainees' claims, except as they may be asserted in the D.C. Circuit under Section 1005(e)(3) of the DTA. See MCA § 7(a), 120 Stat. 2636 (barring habeas claims and any claims relating to, *inter alia*, "trial," except as provided by § 1005(e) of the DTA). Similarly without merit is petitioner's suggestion that the government may attempt to preclude judicial review of final decisions of the military commission by purposely failing to finalize the military commission's judgment. See Pet. 21. This claim is entirely speculative and is inconsistent with the presumption of regularity and good faith to which government proceedings are entitled. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

Second, petitioners assert (Pet. 21-22) that the scope of review under the DTA and the MCA is narrower than that afforded in habeas, particularly as the MCA excludes conditions-of-confinement claims. But a habeas action is not an appropriate vehicle for challenging conditions of confinement, rather than the fact of detention or its duration. See, *e.g.*, *Wilkinson* v. *Dotson*, 544 U.S. 74, 85-87 (2005) (Scalia, J., concurring); *Bell* v. *Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser* v. *Rodriguez*, 411 U.S. 475, 499-500 (1973); *Cochran* v. *Buss*, 381 F.3d 637, 639 (7th Cir. 2004).

Third, petitioners argue (Pet. 22) that it is unclear whether the D.C. Circuit's review encompasses constitu-

tional claims. In fact, the DTA makes clear that detainees may raise claims that the standards and procedures followed by CSRTs or military commissions are not consistent with the Constitution, to the extent that it is applicable. See DTA § 1005(e)(2) and (e)(3), 120 Stat. 2631. Respondents' position is that petitioners have no constitutional rights in this context, but petitioners can plead their arguments to the contrary to the D.C. Circuit. That court should resolve that issue, at least in the first instance.

Fourth, petitioners claim (Pet. 23) that the MCA precludes them from raising treaty claims, which they previously would have been permitted to raise in a habeas action. That is also an issue that should be litigated in the D.C. Circuit in the first instance in the context of a petition for review. In any event, however, any constitutional right to common-law habeas would certainly not include the right to press claims under treaties that do not provide judicially enforceable rights to private parties. Thus, even if petitioners have constitutional habeas rights, Congress' amendment of the habeas statute to remove habeas jurisdiction over actions brought by aliens detained as enemy combatants, including any treaty claims, raises no Suspension Clause issues. And contrary to petitioners' assertion, the MCA does not abrogate the Geneva Conventions, but simply clarifies that the Geneva Conventions are not judicially enforceable by private parties. See MCA § 5(a), 120 Stat. 2631. There cannot possibly be any constitutional impediment to Congress limiting enforcement of a treaty to diplomatic and non-judicial processes. Indeed, that is the norm for treaties. See, e.g., *Holmes* v. *Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972).

Finally, petitioners argue (Pet. 24) that review under the MCA is inadequate because it precludes review of the sufficiency of the evidence. But as we have explained, see pp. 15-16, *supra*, habeas review in this context does not provide for the examination of the sufficiency of the evidence.

## CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the disposition of *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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# Supreme Court of the United States

SALIM AHMED HAMDAN,
PETITIONER
v.
ROBERT GATES, ET AL.,
RESPONDENTS

OMAR KHADR,
PETITIONER,
v.
GEORGE W. BUSH, ET AL.,
RESPONDENTS

***On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit***

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## I. ARGUMENT

Petitioners – in stark contrast to the parties to *Boumediene and Al Odah v. United States*, 549 U.S. – (2007) (denying certiorari) – are individuals who face imminent trial before a military commission with the power to impose a sentence of life imprisonment or even death. After five years and counting, the government's main argument once again comes down to urging further delay. It rehashes the same arguments it made in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that this Court should decline to hear this case and instead let the criminal proceedings unfold. Just as the Court properly rejected the government's exhaustion claims then, it should do the same now.

1. Although "traditional rules governing [the] decision of constitutional questions, and [the] practice of requiring the exhaustion of available remedies," *Boumediene*, 549 U.S. – (statement of Stevens, J., and Kennedy, J.), sometimes require this Court to defer review, the time to hear this particular case is now.

a. *First*, Respondents plan imminently to try Petitioners in criminal tribunals with the power to impose life imprisonment and even the death penalty. Unlike the petitioners in *Boumediene* and *Al Odah*, who currently face detention but not trial, Hamdan and Khadr face imminent trials that will indelibly alter their legal status and threaten their very lives. *See Boumediene*, *supra* (stating that the case would be different if there were "some other and ongoing injury").

*Second*, the right Petitioners seek to vindicate is the right not to be tried at all by an unconstitutional military commission, a right that obviously cannot be vindicated through even the best intentioned *post hoc* review. Pet. at 21. Petitioners are irreparably harmed by having to defend themselves in trials where they are kept ignorant as to whether or not the Constitution protects them and governs the procedures by which their prosecutions are allowed to proceed. *See* Pet. at 11 n.9. These rights will be impossible for the federal courts to fully vindicate ex post. *See infra* p.8; *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level." (citing *Abney v. United States*, 431 U.S. 651, 660 (1997)).

Indeed, a trial will irreversibly provide the prosecution a preview of Petitioners' defense and trial strategy, a compelled disclosure that unquestionably "prejudice[s] the position of [P]etitioners." *Boumediene*, 549 U.S. – , slip. op. at 2. *See Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989) ("Rafeedie's second claim of injury is that the practical necessity to provide, in the § 235(c) proceeding, all information about his activities abroad *will prejudice him* in any later exclusion proceeding. Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a 'substantial practical litigation advantage.' . . . if he presents his defense in a § 235(c) proceeding, [] the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*") (emphasis added).

*Third*, the reputation of the United States is on the line in these novel and untested trials. Both the Secretary of Defense and Secretary of State have expressed opposition to the trials.[1] The recent plea of David Hicks has cast further doubt on the ability of these commissions to prosecute cases fairly.[2] These trials, which bring to bear the most awesome powers of government, are slated to take place in Guantanamo—a place that is, according to the decisions below, exempt from our most deeply-held constitutional guarantees. If they go forward within that legal vacuum, the process will ultimately cast doubt on this nation's judicial system and our hallowed traditions of fairness in the eyes of the world. As

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[1] Defense Department Budget for FY2008: Hearing of the Defense Subcomm. of the House Appropriations Comm., 110th Cong. (March 29, 2007) (testimony of Secretary Robert Gates, U.S. Dep't. of Defense); Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007 at A1.

[2] Editorial, *Guantanamo Follies*, N.Y. Times, Apr. 6, 2007 at A18 (criticizing the Hicks plea bargain as "emblematic" of the "lawless nature" of the Guantanamo facility); Editorial, *Spectacle at Guantanamo*, Wash. Post, Apr. 4, 2007 (David Hicks plea shows that the military commission process can be "politically twisted in a way that would be inconceivable in a credible court of law"); Editorial, *A Plea Tainted by Guantanamo*, Canberra Times, Mar. 29, 2007 (stating that the military commission process "highlights the willingness of the US Government . . . to sidestep the rule of law [and] ignore accepted conventions of human rights").

Justice Rutledge warned: "It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late." *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (Rutledge, J., dissenting).

*Fourth*, a habeas petitioner is not required to exhaust remedies that are inadequate or ineffective at protecting the rights of the petitioner. *See* R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice & Procedure § 23.4(a), at 1095 (5th ed. 2005); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (habeas petitioner has no obligation to exhaust inadequate remedy); *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (same). The DTA procedures are a wholly inadequate substitute for true habeas review. *See* Pet. at 21-23. Moreover, the government's assurances that Hamdan and Khadr will be able to argue their claims of constitutional violations to the D.C. Circuit on DTA review ring hollow. Opp. at 14. That Circuit has already squarely held that detainees such as Hamdan and Khadr enjoy *no* constitutional rights that could be violated. Pet. App. at 62a-67a. Such an argument would be fated to fail before it was even made, rendering exhaustion futile.[3] For these reasons, the Petitioners are under no obligation to exhaust the DTA procedures, since any trial would take place against the backdrop of the Court of Appeals' decision holding no constitutional rights for those at Guantanamo.[4]

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[3] *See, e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (finding "that exhaustion would have been futile" and therefore unnecessary where the state supreme court had previously rejected the claim in other cases); *Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974) (futility found because state supreme court "had consistently rejected" similar claims and no exhaustion required). Even in the absence of futility, exhaustion is not an immutable rule barring this Court's review. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (habeas exhaustion not required where "'special circumstances'" render "prompt decision of the issues raised [] desirable.").

[4] Moreover, Petitioners could not have exhausted their remedies under the DTA before bringing this habeas action in federal court for the simple reason that the DTA did not exist at the time their habeas petitions were filed. Hamdan filed his habeas petition in April 2004 while Khadr filed his petition in July 2004, predating the December 2005 DTA. But it is well-settled that a habeas petitioner is not required to exhaust procedures that *do not exist* at the time his petition was filed. *See* Hertz & Liebman, *supra* at 1093.

b. Finally, and most importantly, this Court has already squarely rejected the government's arguments. In *Hamdan*, the government spent considerable time arguing that Mr. Hamdan was required to go through his trial and exhaust the review procedures in the DTA, including D.C. Circuit review. Resps.' Mot. Dis. at 17, No. 05-184 ("judicial review of military commission proceedings should occur only after those proceedings have been completed"); Resps.' Merits Br., No. 05-184 at 12-15. This Court flatly rejected all of these contentions, holding that both the Petitioners and the government "have a compelling interest in knowing in advance whether [the Petitioners] may be tried by a military commission that arguably is without basis in law." *Hamdan*, 126 S. Ct. at 2772; *see also Ex parte Quirin*, 317 U.S. 1, 19 (1942) (review on expedited basis prior to conclusion of trial because of the "*public interest*") (emphasis added).

Delaying this Court's inquiry into the constitutionality of the deprivation of habeas review when Petitioners are facing life imprisonment and the death penalty serves no purpose.[5] The claims forwarded by Petitioners are pure questions of law concerning whether they retain the right to habeas review and whether the Constitution protects them in the commission process. Nothing would be gained by answering these questions after DTA review, instead of now. As this Court held in this very case, "review of the [military commission] procedures in advance of a 'final decision'—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate." *Hamdan*, 126 S. Ct. at 2788.

Had this Court accepted Respondents' previous invitation to abstain, the result would have been dozens of trials under the President's military commissions with convictions that this Court would have had to overturn since that system did not comply with our laws. This Court correctly avoided that terrible result then, and

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[5] Just as in *Hamdan*, 126 S. Ct. at 2771, neither of the concerns mitigating towards abstention in *Councilman* applies here – there is no threat to military discipline from review since Petitioners are not military personnel and the review process under the DTA does not allow for plenary review by an authority independent of the military structure. The MCA provides for plenary review of a commission conviction only by a court comprised of military judges appointed by the Secretary of Defense. MCA § 950f. Such an appellate court clearly does not possess the "structural insulation from military influence" this Court required in *Hamdan*, 126 S. Ct. at 2771.

it should do the same now. If commissions are worth conducting, they are worth conducting lawfully and, almost as importantly, being *perceived* as so conducted. Only the Court's prompt and decisive resolution of the questions presented can dispel the clouds that hang over this process in a swift and certain manner.

2. For the above reasons, this petition raises issues of vital national and international importance requiring immediate determination. Moreover, this case is an appropriate vehicle to address these questions, particularly in light of the denial of the petitions for certiorari in *Boumediene* and *Odah*.[6]

The government attempts to argue that this Petition does not meet the standard for certiorari before judgment, trying to minimize the fact that the Court granted certiorari before judgment in *Ex parte Quirin*.[7] It observes that the Court has recently denied certiorari before judgment in a series of cases, including *Hamdan v. Rumsfeld*, No. 04-702. But this is no mere petition for certiorari before judgment: it includes the post-judgment petition of Mr. Khadr and seeks pre-judgment review on behalf of Mr. Hamdan; as the Petition demonstrates, this Court more regularly grants

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[6] The government argues that Supreme Court Rule 12.4 does not permit these petitions for certiorari to be joined. The government is incorrect. First, the Clerk's Office was required to check the petition for compliance with the Court's Rules before docketing it and accepted the joint petition without reservation. Second, the government's argument turns on the bizarre assumption that a "judgment" under Rule 12.4 may only be issued by a Court of Appeals. Such a restriction appears nowhere in the Rules themselves and the government tellingly offers no support for that proposition. In fact, it is well-settled that "judgments" issue from district courts as well as courts of appeal. Here, there are two judgments—one from the D.C. Circuit and one from the D.C. District Court—"sought to be reviewed on a writ of certiorari to the same court" under Rule 12.4—the D.C. Circuit, which currently has jurisdiction over both cases. As such, there is nothing in Rule 12.4 to prevent Hamdan's petition for certiorari before judgment to be joined with Khadr's ordinary petition for certiorari.

If this Court disagrees, it may simply deem the Petition two separate filings, analogous to its practice of deeming an application for a stay to be a Petition for Certiorari. That such an exercise would be pure formality brings into sharp relief the government's elevation of form over substance.

[7] The government is wrong to assert that *Quirin* was granted due to the "imminent execution" of the defendants. Opp. at 19. The defendants had not even been convicted at the time the Court heard the case, and the Court stated it heard the case because the "public interest" required it. 317 U.S. at 19. For that reason, the government cites to nothing at all in support of its revisionist history.

certiorari before judgment in such a companion case to ensure that it has before it appropriate vehicles to fully decide an issue on which review has been granted. *See* Pet. 9-10. The government also omits that in each of the cases it cites, the Court had not previously considered the case or issue, whereas here it has considered this very case already. The relevant precedents in this different context, are cases such as *Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) and others cited at Pet. 11, where the Court granted certiorari before judgment when a case was coming back to the Court. Here, the case for certiorari before judgment is even stronger since the Petition presents a clean issue of immediate importance: Do the Constitution's fundamental guarantees apply to constrain a criminal trial at Guantanamo that is about to take place?

If this Court were to deny certiorari, trials at Guantanamo would begin against the backdrop of no constitutional rights at all. Defendants like Mr. Hamdan would be tried for offenses, such as conspiracy, that were not violations of the laws of war at the time of their alleged action. The government reassures the Court that Petitioners can raise their constitutional challenges to the D.C. Circuit which "should resolve that issue" first, Opp. at 25, forgetting that a mere 4 pages earlier they stated that the D.C. Circuit's decision in *Odah* and *Boumediene* had resolved these issues by stating that the Constitution does not apply to Guantanamo. Opp. at 21. The D.C. Circuit has said that no constitutional rights protect Petitioners, and therefore there is nothing left to exhaust.

2. a. Respondents contend that the Petitioners' claims as to the inadequacy of review of military-commission convictions under the DTA and MCA as a substitute for habeas review "add little to the arguments that have already been presented by the petitioners in *Boumediene* and *Al-Odah*." Opp. at 23. But as explained above, the claims raised by *Boumediene* and *Al-Odah* were *fundamentally* different from those raised by Petitioners here. Most importantly, petitioners in those two cases did *not* challenge the review process for "military-commission convictions." Rather, they *only* challenged the review process under the two statutes as it relates to CSRT determinations. Although the provisions governing review of commission convictions and CSRT determinations are similar, they are not identical in scope or function. Rather, review under the MCA is identical to the

procedures in place in *Hamdan* under the Detainee Treatment Act of 2005, where this Court *rejected* the government's exhaustion propositions. *Boumediene*, 549 U.S. – (Breyer, J., dissenting) ("[*Hamdan*] presented questions of the scope of the Guantanamo detainees' right to [] review of DTA-authorized procedures. We there rejected the Government's argument for delay as unsound.")

On the merits, the government disputes the various inadequacies of the DTA/MCA review process set forth in the Petition. Opp. at 23-26. Indeed, they elsewhere argue that the review under the MCA is somehow superior to traditional habeas review. Opp. at 14-16. These arguments are baseless.

*First*, by the government's own admission, common law habeas review addresses the "threshold jurisdictional question [of] whether the offense and offender were triable by military commission." Opp. at 15. But under the MCA, a CSRT finding "that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." MCA § 948d(c). Thus, at the most basic level, the DTA/MCA review process cannot adequately substitute for common law habeas since a defendant lacks the ability to challenge the jurisdiction of the military commission—an inquiry even Respondents recognize as central to constitutional habeas.

Moreover, notwithstanding Respondents' claim to the contrary, common law habeas review is *not* limited to simply determining the jurisdictional question. Opp. at 15. Rather, the robust habeas system enshrined in the Constitution allows the Petitioners to challenge the conditions of their confinement, assert treaty-based claims against the government, and have a reviewing habeas court examine the sufficiency of the evidence in these unique military proceedings. Pet. at 21-23. Respondents' reliance on *In re Yamashita*, 327 U.S. 1 (1946) to suggest otherwise is unavailing. As this Court noted last Term, *Yamashita* "has been stripped of its precedential value." *Hamdan*, 126 S. Ct. at 2790. Furthermore, although *Yamashita* did not review the tribunal's specific evidentiary rulings, it did employ habeas review to determine whether the tribunal had admitted evidence in violation of "any act of Congress, treaty, or military command." 327 U.S. at 23. Likewise in *Quirin*, although the Court held that the military commission procedures were not in conflict with the Articles of War, there was no suggestion that such a challenge to commission procedures was beyond the power of the Court on habeas review

because that review was limited to the "threshold jurisdictional question" alone. *Quirin*, 317 U.S. at 47-48; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (employing habeas review to examine not only the authority to detain but also the procedural framework to challenge detention as an enemy combatant).

*Second*, the government incorrectly asserts that Congress may jurisdictionally bar pre-trial claims "until an administrative or military ruling becomes final." Opp. at 24. The three cases it cites only support the limited proposition that, in the *administrative law* context, courts should fashion exhaustion principles consistent with congressional intent and the relevant statutory scheme. *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Booth v. Churner*, 532 U.S. 731 (2001); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). By contrast, in the military trial context, this Court has consistently held that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). Even when civilian appellate review is ultimately available, pre-trial habeas review is not barred when the very power of the military system to legally try the defendant in the first instance is challenged. *Councilman*, 420 U.S. at 759; *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

*Third*, the government's claim that habeas review is not an appropriate vehicle for a condition-of-confinement claim is misguided and none of the authority cited by the government supports that proposition. Opp. at 24.[8]

*Fourth*, the government misunderstands Petitioners' argument that the DTA/MCA review is inadequate because it bars claims based on federal treaty obligations. Respondents urge that even with habeas rights, Petitioners could raise no treaty claims because MCA § 5(a) precludes the private enforcement of such claims.

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[8] Indeed, in *Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973), after reaffirming that a prisoner may challenge the conditions of his confinement through §1983, the Court specifically stated that "[t]his is not to say that habeas corpus may not also be available to challenge such prison conditions." *Id.* And, in fact, the Court has repeatedly noted that such condition-of-confinement claims are properly the subject of habeas claims. *Wilwording*, 404 U.S. at 251 (stating that such a claim was "cognizable in federal habeas corpus"); *Johnson v. Avery*, 393 U.S. 483 (1969).

Opp. at 25. But the MCA can only bars courts from hearing treaty claims on statutory habeas petitions, not on common law constitutional habeas petitions, because the Suspension Clause, at a minimum, protects the latter species of habeas as it existed in 1789. *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). Early American cases show that common law habeas was understood to allow courts to review treaty-based claims.[9] Congress cannot force exhaustion in a process that fails to provide an adequate substitute for habeas. *Cf. Swain v. Pressley*, 430 U.S. 372, 377-78 (1977).

Moreover, the provisions of the MCA cited by the government as removing Petitioner's treaty-based claims from the ambit of habeas review are themselves unconstitutional. The Court has already held that Petitioners may invoke the Geneva Conventions as a source of protection, *Hamdan*, 126 S. Ct. at 2796, and has suggested that the Conventions create privately enforceable rights. *Id.* at 2794 n.57 & n.58. By purporting to strip federal courts of jurisdiction to hear treaty-based claims, the MCA unconstitutionally prevents implementation of this Court's decision in *Hamdan*. Pet. at 23-24; *see also* Amici Brief of Bruce Ackerman et al., No. 06-1169, at 18.[10]

Adequate procedural protections, such as those found in state court criminal proceedings or courts-martial, assure a reviewing court of the reliability of the factual findings and obviate the need for habeas review of factual determinations. *See Hamdan*, 126 S. Ct. at 2788 (noting that historically military commissions and

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[9] *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003) (noting the "long history of use of habeas by aliens to challenge confinement in violation of treaty obligations").

[10] Respondents also rely on *INS v. St. Cyr*, 533 U.S. 289 (2001), for the proposition that "traditional habeas review" did not encompass a review of the Executive's factual determinations but was, rather, limited to pure questions of law. Opp. at 15. But as *St. Cyr* itself makes clear, the case was not about "traditional habeas review" but instead concerned habeas "to test the legality of [a] deportation order." 533 U.S. at 306. As the cases cited herein and in the Petition make clear, traditional habeas review over claims by enemy aliens does involve a review of factual determinations. Pet. at 23; *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies); *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same); see also Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

courts-martial operated by the same procedural rules); 28 U.S.C. § 2254(e). Because the MCA departs from the historical congruence of commission and court-martial procedures, its proceedings do not deserve the same deference when reviewed on habeas.[11]

## II. CONCLUSION

The Court should grant certiorari to hear Petitioners' constitutional claims now, instead of forcing further review in a court that has already effectively rejected them.

Respectfully submitted.

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[11] Respondents only briefly respond to Petitioners' constitutional claims and do so unconvincingly. Opp. at 21 n. 4. On the Bill of Attainder claim, the government first asserts that the MCA does meet the "specificity" element of a bill of attainder. *Id.* The government's claim is puzzling given its recognition that the MCA applies to a very specific group: "aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations." *Id.* Nor does the open-ended nature of the group singled out by the MCA save it. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (striking down a state constitutional provision barring anyone who failed to take an oath from certain forms of employment). Likewise, the government's claim that the MCA does not work punishment conflicts with this Court's recognition that the deprivation of complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872).

Respondents' equal protection argument is similarly weak. They argue that the MCA does not impinge on a fundamental right because the MCA provides "adequate and appropriate" substitute relief. That claim is wrong. *See supra* pp. 7-9. Further, this Court has noted that habeas is among the rights "to be regarded as the very essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971).

Respondents' claim that federal classifications based on alienage warrant only rational basis review is similarly misguided. In *Matthews v. Diaz*, 426 U.S. 67 (1976), this Court held only that in doling out scarce government benefits, Congress may differentiate between citizens and aliens as well as between classes of aliens. *Id.* at 78-79. But the Court made clear that, when liberty interests are at stake, the Fifth Amendment "protects every one of these [aliens] from deprivation of life, liberty, or property without due process of law" even when the alien's presence is "unlawful, involuntary, or transitory." *Id.* at 77. *Matthews* does not hold that the Equal Protection Clause requires only a rational basis to uphold discrimination against aliens of the type perpetrated by the MCA.

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# Supreme Court of the United States

| SALIM AHMED HAMDAN, PETITIONER v. ROBERT GATES, ET AL., RESPONDENTS | OMAR KHADR, PETITIONER, v. GEORGE W. BUSH, ET AL., RESPONDENTS |
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***On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit***

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## I. ARGUMENT

Petitioners – in stark contrast to the parties to *Boumediene and Al Odah v. United States*, 549 U.S. – (2007) (denying certiorari) – are individuals who face imminent trial before a military commission with the power to impose a sentence of life imprisonment or even death. After five years and counting, the government's main argument once again comes down to urging further delay. It rehashes the same arguments it made in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that this Court should decline to hear this case and instead let the criminal proceedings unfold. Just as the Court properly rejected the government's exhaustion claims then, it should do the same now.

1. Although "traditional rules governing [the] decision of constitutional questions, and [the] practice of requiring the exhaustion of available remedies," *Boumediene*, 549 U.S. – (statement of Stevens, J., and Kennedy, J.), sometimes require this Court to defer review, the time to hear this particular case is now.

a. *First*, Respondents plan imminently to try Petitioners in criminal tribunals with the power to impose life imprisonment and even the death penalty. Unlike the petitioners in *Boumediene* and *Al Odah*, who currently face detention but not trial, Hamdan and Khadr face imminent trials that will indelibly alter their legal status and threaten their very lives. *See Boumediene*, *supra* (stating that the case would be different if there were "some other and ongoing injury").

*Second*, the right Petitioners seek to vindicate is the right not to be tried at all by an unconstitutional military commission, a right that obviously cannot be vindicated through even the best intentioned *post hoc* review. Pet. at 21. Petitioners are irreparably harmed by having to defend themselves in trials where they are kept ignorant as to whether or not the Constitution protects them and governs the procedures by which their prosecutions are allowed to proceed. *See* Pet. at 11 n.9. These rights will be impossible for the federal courts to fully vindicate ex post. *See infra* p.8; *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level." (citing *Abney v. United States*, 431 U.S. 651, 660 (1997)).

Indeed, a trial will irreversibly provide the prosecution a preview of Petitioners' defense and trial strategy, a compelled disclosure that unquestionably "prejudice[s] the position of [P]etitioners." *Boumediene*, 549 U.S. – , slip. op. at 2. *See Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989) ("Rafeedie's second claim of injury is that the practical necessity to provide, in the § 235(c) proceeding, all information about his activities abroad *will prejudice him* in any later exclusion proceeding. Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a 'substantial practical litigation advantage.' . . . if he presents his defense in a § 235(c) proceeding, [] the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*") (emphasis added).

*Third*, the reputation of the United States is on the line in these novel and untested trials. Both the Secretary of Defense and Secretary of State have expressed opposition to the trials.[1] The recent plea of David Hicks has cast further doubt on the ability of these commissions to prosecute cases fairly.[2] These trials, which bring to bear the most awesome powers of government, are slated to take place in Guantanamo—a place that is, according to the decisions below, exempt from our most deeply-held constitutional guarantees. If they go forward within that legal vacuum, the process will ultimately cast doubt on this nation's judicial system and our hallowed traditions of fairness in the eyes of the world. As

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[1] Defense Department Budget for FY2008: Hearing of the Defense Subcomm. of the House Appropriations Comm., 110th Cong. (March 29, 2007) (testimony of Secretary Robert Gates, U.S. Dep't. of Defense); Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007 at A1.

[2] Editorial, *Guantanamo Follies*, N.Y. Times, Apr. 6, 2007 at A18 (criticizing the Hicks plea bargain as "emblematic" of the "lawless nature" of the Guantanamo facility); Editorial, *Spectacle at Guantanamo*, Wash. Post, Apr. 4, 2007 (David Hicks plea shows that the military commission process can be "politically twisted in a way that would be inconceivable in a credible court of law"); Editorial, *A Plea Tainted by Guantanamo*, Canberra Times, Mar. 29, 2007 (stating that the military commission process "highlights the willingness of the US Government . . . to sidestep the rule of law [and] ignore accepted conventions of human rights").

Justice Rutledge warned: "It is not too early, it is never too early, for the nation steadfastiy to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late." *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (Rutledge, J., dissenting).

*Fourth*, a habeas petitioner is not required to exhaust remedies that are inadequate or ineffective at protecting the rights of the petitioner. *See* R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice & Procedure § 23.4(a), at 1095 (5th ed. 2005); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (habeas petitioner has no obligation to exhaust inadequate remedy); *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (same). The DTA procedures are a wholly inadequate substitute for true habeas review. *See* Pet. at 21-23. Moreover, the government's assurances that Hamdan and Khadr will be able to argue their claims of constitutional violations to the D.C. Circuit on DTA review ring hollow. Opp. at 14. That Circuit has already squarely held that detainees such as Hamdan and Khadr enjoy *no* constitutional rights that could be violated. Pet. App. at 62a-67a. Such an argument would be fated to fail before it was even made, rendering exhaustion futile.[3] For these reasons, the Petitioners are under no obligation to exhaust the DTA procedures, since any trial would take place against the backdrop of the Court of Appeals' decision holding no constitutional rights for those at Guantanamo.[4]

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[3] *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (finding "that exhaustion would have been futile" and therefore unnecessary where the state supreme court had previously rejected the claim in other cases); *Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974) (futility found because state supreme court "had consistently rejected" similar claims and no exhaustion required). Even in the absence of futility, exhaustion is not an immutable rule barring this Court's review. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (habeas exhaustion not required where "'special circumstances'" render "prompt decision of the issues raised [] desirable.").

[4] Moreover, Petitioners could not have exhausted their remedies under the DTA before bringing this habeas action in federal court for the simple reason that the DTA did not exist at the time their habeas petitions were filed. Hamdan filed his habeas petition in April 2004 while Khadr filed his petition in July 2004, predating the December 2005 DTA. But it is well-settled that a habeas petitioner is not required to exhaust procedures that *do not exist* at the time his petition was filed. *See* Hertz & Liebman, *supra* at 1093.

b. Finally, and most importantly, this Court has already squarely rejected the government's arguments. In *Hamdan*, the government spent considerable time arguing that Mr. Hamdan was required to go through his trial and exhaust the review procedures in the DTA, including D.C. Circuit review. Resps.' Mot. Dis. at 17, No. 05-184 ("judicial review of military commission proceedings should occur only after those proceedings have been completed"); Resps.' Merits Br., No. 05-184 at 12-15. This Court flatly rejected all of these contentions, holding that both the Petitioners and the government "have a compelling interest in knowing in advance whether [the Petitioners] may be tried by a military commission that arguably is without basis in law." *Hamdan*, 126 S. Ct. at 2772; *see also Ex parte Quirin*, 317 U.S. 1, 19 (1942) (review on expedited basis prior to conclusion of trial because of the "*public interest*") (emphasis added).

Delaying this Court's inquiry into the constitutionality of the deprivation of habeas review when Petitioners are facing life imprisonment and the death penalty serves no purpose.[5] The claims forwarded by Petitioners are pure questions of law concerning whether they retain the right to habeas review and whether the Constitution protects them in the commission process. Nothing would be gained by answering these questions after DTA review, instead of now. As this Court held in this very case, "review of the [military commission] procedures in advance of a 'final decision'—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate." *Hamdan*, 126 S. Ct. at 2788.

Had this Court accepted Respondents' previous invitation to abstain, the result would have been dozens of trials under the President's military commissions with convictions that this Court would have had to overturn since that system did not comply with our laws. This Court correctly avoided that terrible result then, and

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[5] Just as in *Hamdan*, 126 S. Ct. at 2771, neither of the concerns mitigating towards abstention in *Councilman* applies here – there is no threat to military discipline from review since Petitioners are not military personnel and the review process under the DTA does not allow for plenary review by an authority independent of the military structure. The MCA provides for plenary review of a commission conviction only by a court comprised of military judges appointed by the Secretary of Defense. MCA § 950f. Such an appellate court clearly does not possess the "structural insulation from military influence" this Court required in *Hamdan*, 126 S. Ct. at 2771.

it should do the same now. If commissions are worth conducting, they are worth conducting lawfully and, almost as importantly, being *perceived* as so conducted. Only the Court's prompt and decisive resolution of the questions presented can dispel the clouds that hang over this process in a swift and certain manner.

2. For the above reasons, this petition raises issues of vital national and international importance requiring immediate determination. Moreover, this case is an appropriate vehicle to address these questions, particularly in light of the denial of the petitions for certiorari in *Boumediene* and *Odah*.[6]

The government attempts to argue that this Petition does not meet the standard for certiorari before judgment, trying to minimize the fact that the Court granted certiorari before judgment in *Ex parte Quirin*.[7] It observes that the Court has recently denied certiorari before judgment in a series of cases, including *Hamdan v. Rumsfeld*, No. 04-702. But this is no mere petition for certiorari before judgment: it includes the post-judgment petition of Mr. Khadr and seeks pre-judgment review on behalf of Mr. Hamdan; as the Petition demonstrates, this Court more regularly grants

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[6] The government argues that Supreme Court Rule 12.4 does not permit these petitions for certiorari to be joined. The government is incorrect. First, the Clerk's Office was required to check the petition for compliance with the Court's Rules before docketing it and accepted the joint petition without reservation. Second, the government's argument turns on the bizarre assumption that a "judgment" under Rule 12.4 may only be issued by a Court of Appeals. Such a restriction appears nowhere in the Rules themselves and the government tellingly offers no support for that proposition. In fact, it is well-settled that "judgments" issue from district courts as well as courts of appeal. Here, there are two judgments—one from the D.C. Circuit and one from the D.C. District Court—"sought to be reviewed on a writ of certiorari to the same court" under Rule 12.4—the D.C. Circuit, which currently has jurisdiction over both cases. As such, there is nothing in Rule 12.4 to prevent Hamdan's petition for certiorari before judgment to be joined with Khadr's ordinary petition for certiorari.

If this Court disagrees, it may simply deem the Petition two separate filings, analogous to its practice of deeming an application for a stay to be a Petition for Certiorari. That such an exercise would be pure formality brings into sharp relief the government's elevation of form over substance.

[7] The government is wrong to assert that *Quirin* was granted due to the "imminent execution" of the defendants. Opp. at 19. The defendants had not even been convicted at the time the Court heard the case, and the Court stated it heard the case because the "public interest" required it. 317 U.S. at 19. For that reason, the government cites to nothing at all in support of its revisionist history.

certiorari before judgment in such a companion case to ensure that it has before it appropriate vehicles to fully decide an issue on which review has been granted. *See* Pet. 9-10. The government also omits that in each of the cases it cites, the Court had not previously considered the case or issue, whereas here it has considered this very case already. The relevant precedents in this different context, are cases such as *Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) and others cited at Pet. 11, where the Court granted certiorari before judgment when a case was coming back to the Court. Here, the case for certiorari before judgment is even stronger since the Petition presents a clean issue of immediate importance: Do the Constitution's fundamental guarantees apply to constrain a criminal trial at Guantanamo that is about to take place?

If this Court were to deny certiorari, trials at Guantanamo would begin against the backdrop of no constitutional rights at all. Defendants like Mr. Hamdan would be tried for offenses, such as conspiracy, that were not violations of the laws of war at the time of their alleged action. The government reassures the Court that Petitioners can raise their constitutional challenges to the D.C. Circuit which "should resolve that issue" first, Opp. at 25, forgetting that a mere 4 pages earlier they stated that the D.C. Circuit's decision in *Odah* and *Boumediene* had resolved these issues by stating that the Constitution does not apply to Guantanamo. Opp. at 21. The D.C. Circuit has said that no constitutional rights protect Petitioners, and therefore there is nothing left to exhaust.

2. a. Respondents contend that the Petitioners' claims as to the inadequacy of review of military-commission convictions under the DTA and MCA as a substitute for habeas review "add little to the arguments that have already been presented by the petitioners in *Boumediene* and *Al-Odah*." Opp. at 23. But as explained above, the claims raised by *Boumediene* and *Al-Odah* were *fundamentally* different from those raised by Petitioners here. Most importantly, petitioners in those two cases did *not* challenge the review process for "military-commission convictions." Rather, they *only* challenged the review process under the two statutes as it relates to CSRT determinations. Although the provisions governing review of commission convictions and CSRT determinations are similar, they are not identical in scope or function. Rather, review under the MCA is identical to the

procedures in place in *Hamdan* under the Detainee Treatment Act of 2005, where this Court *rejected* the government's exhaustion propositions. *Boumediene*, 549 U.S. – (Breyer, J., dissenting) ("[*Hamdan*] presented questions of the scope of the Guantanamo detainees' right to [] review of DTA-authorized procedures. We there rejected the Government's argument for delay as unsound.")

On the merits, the government disputes the various inadequacies of the DTA/MCA review process set forth in the Petition. Opp. at 23-26. Indeed, they elsewhere argue that the review under the MCA is somehow superior to traditional habeas review. Opp. at 14-16. These arguments are baseless.

*First*, by the government's own admission, common law habeas review addresses the "threshold jurisdictional question [of] whether the offense and offender were triable by military commission." Opp. at 15. But under the MCA, a CSRT finding "that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." MCA § 948d(c). Thus, at the most basic level, the DTA/MCA review process cannot adequately substitute for common law habeas since a defendant lacks the ability to challenge the jurisdiction of the military commission—an inquiry even Respondents recognize as central to constitutional habeas.

Moreover, notwithstanding Respondents' claim to the contrary, common law habeas review is *not* limited to simply determining the jurisdictional question. Opp. at 15. Rather, the robust habeas system enshrined in the Constitution allows the Petitioners to challenge the conditions of their confinement, assert treaty-based claims against the government, and have a reviewing habeas court examine the sufficiency of the evidence in these unique military proceedings. Pet. at 21-23. Respondents' reliance on *In re Yamashita*, 327 U.S. 1 (1946) to suggest otherwise is unavailing. As this Court noted last Term, *Yamashita* "has been stripped of its precedential value." *Hamdan*, 126 S. Ct. at 2790. Furthermore, although *Yamashita* did not review the tribunal's specific evidentiary rulings, it did employ habeas review to determine whether the tribunal had admitted evidence in violation of "any act of Congress, treaty, or military command." 327 U.S. at 23. Likewise in *Quirin*, although the Court held that the military commission procedures were not in conflict with the Articles of War, there was no suggestion that such a challenge to commission procedures was beyond the power of the Court on habeas review

because that review was limited to the "threshold jurisdictional question" alone. *Quirin*, 317 U.S. at 47-48; *cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (employing habeas review to examine not only the authority to detain but also the procedural framework to challenge detention as an enemy combatant).

*Second*, the government incorrectly asserts that Congress may jurisdictionally bar pre-trial claims "until an administrative or military ruling becomes final." Opp. at 24. The three cases it cites only support the limited proposition that, in the *administrative law* context, courts should fashion exhaustion principles consistent with congressional intent and the relevant statutory scheme. *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Booth v. Churner*, 532 U.S. 731 (2001); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). By contrast, in the military trial context, this Court has consistently held that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). Even when civilian appellate review is ultimately available, pre-trial habeas review is not barred when the very power of the military system to legally try the defendant in the first instance is challenged. *Councilman*, 420 U.S. at 759; *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

*Third*, the government's claim that habeas review is not an appropriate vehicle for a condition-of-confinement claim is misguided and none of the authority cited by the government supports that proposition. Opp. at 24.[8]

*Fourth*, the government misunderstands Petitioners' argument that the DTA/MCA review is inadequate because it bars claims based on federal treaty obligations. Respondents urge that even with habeas rights, Petitioners could raise no treaty claims because MCA § 5(a) precludes the private enforcement of such claims.

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[8] Indeed, in *Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973), after reaffirming that a prisoner may challenge the conditions of his confinement through §1983, the Court specifically stated that "[t]his is not to say that habeas corpus may not also be available to challenge such prison conditions." *Id.* And, in fact, the Court has repeatedly noted that such condition-of-confinement claims are properly the subject of habeas claims. *Wilwording*, 404 U.S. at 251 (stating that such a claim was "cognizable in federal habeas corpus"); *Johnson v. Avery*, 393 U.S. 483 (1969).

Opp. at 25. But the MCA can only bars courts from hearing treaty claims on statutory habeas petitions, not on common law constitutional habeas petitions, because the Suspension Clause, at a minimum, protects the latter species of habeas as it existed in 1789. *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). Early American cases show that common law habeas was understood to allow courts to review treaty-based claims.[9] Congress cannot force exhaustion in a process that fails to provide an adequate substitute for habeas. *Cf. Swain v. Pressley*, 430 U.S. 372, 377-78 (1977).

Moreover, the provisions of the MCA cited by the government as removing Petitioner's treaty-based claims from the ambit of habeas review are themselves unconstitutional. The Court has already held that Petitioners may invoke the Geneva Conventions as a source of protection, *Hamdan*, 126 S. Ct. at 2796, and has suggested that the Conventions create privately enforceable rights. *Id.* at 2794 n.57 & n.58. By purporting to strip federal courts of jurisdiction to hear treaty-based claims, the MCA unconstitutionally prevents implementation of this Court's decision in *Hamdan*. Pet. at 23-24; *see also* Amici Brief of Bruce Ackerman et al., No. 06-1169, at 18.[10]

Adequate procedural protections, such as those found in state court criminal proceedings or courts-martial, assure a reviewing court of the reliability of the factual findings and obviate the need for habeas review of factual determinations. *See Hamdan*, 126 S. Ct. at 2788 (noting that historically military commissions and

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[9] *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003) (noting the "long history of use of habeas by aliens to challenge confinement in violation of treaty obligations").

[10] Respondents also rely on *INS v. St. Cyr*, 533 U.S. 289 (2001), for the proposition that "traditional habeas review" did not encompass a review of the Executive's factual determinations but was, rather, limited to pure questions of law. Opp. at 15. But as *St. Cyr* itself makes clear, the case was not about "traditional habeas review" but instead concerned habeas "to test the legality of [a] deportation order." 533 U.S. at 306. As the cases cited herein and in the Petition make clear, traditional habeas review over claims by enemy aliens does involve a review of factual determinations. Pet. at 23; *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies); *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same); see also Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

courts-martial operated by the same procedural rules); 28 U.S.C. § 2254(e). Because the MCA departs from the historical congruence of commission and court-martial procedures, its proceedings do not deserve the same deference when reviewed on habeas.[11]

## II. CONCLUSION

The Court should grant certiorari to hear Petitioners' constitutional claims now, instead of forcing further review in a court that has already effectively rejected them.

Respectfully submitted.

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[11] Respondents only briefly respond to Petitioners' constitutional claims and do so unconvincingly. Opp. at 21 n. 4. On the Bill of Attainder claim, the government first asserts that the MCA does meet the "specificity" element of a bill of attainder. *Id.* The government's claim is puzzling given its recognition that the MCA applies to a very specific group: "aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations." *Id.* Nor does the open-ended nature of the group singled out by the MCA save it. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (striking down a state constitutional provision barring anyone who failed to take an oath from certain forms of employment). Likewise, the government's claim that the MCA does not work punishment conflicts with this Court's recognition that the deprivation of complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872).

Respondents' equal protection argument is similarly weak. They argue that the MCA does not impinge on a fundamental right because the MCA provides "adequate and appropriate" substitute relief. That claim is wrong. *See supra* pp. 7-9. Further, this Court has noted that habeas is among the rights "to be regarded as the very essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971).

Respondents' claim that federal classifications based on alienage warrant only rational basis review is similarly misguided. In *Matthews v. Diaz*, 426 U.S. 67 (1976), this Court held only that in doling out scarce government benefits, Congress may differentiate between citizens and aliens as well as between classes of aliens. *Id.* at 78-79. But the Court made clear that, when liberty interests are at stake, the Fifth Amendment "protects every one of these [aliens] from deprivation of life, liberty, or property without due process of law" even when the alien's presence is "unlawful, involuntary, or transitory." *Id.* at 77. *Matthews* does not hold that the Equal Protection Clause requires only a rational basis to uphold discrimination against aliens of the type perpetrated by the MCA.

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IN THE

# Supreme Court of the United States

SALIM AHMED HAMDAN,
*Petitioner*
v.
ROBERT M. GATES, ET AL.,
*Respondents*

OMAR KHADR,
*Petitioner*
v.
GEORGE W. BUSH, ET AL.,
*Respondents*

On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF OF BRUCE A. ACKERMAN, JANET C. ALEXANDER, DAVID COLE, RONALD DWORKIN, FRANK MICHELMAN, MARTHA MINOW, JUDITH RESNIK, WILLIAM S. SESSIONS, and GEOFFREY R. STONE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTERESTS OF *AMICI CURIAE*[1]

Each *Amicus Curiae* appearing herein is a scholar of constitutional law, a scholar of federal courts, or a former government official. Each has special expertise in constitutional structure, history, and tradition and in the origins and principles of habeas corpus jurisdiction. While *Amici* have widely varying perspectives on many issues, *Amici* agree that the Petition in this case presents constitutional issues of exceptional importance and urgency warranting this Court's review through certiorari before judgment.

The institutional affiliations of *Amici Curiae*, for identification purposes only, are as follows: Bruce A. Ackerman, Sterling Professor of Law, Yale Law School; Janet Cooper Alexander, Frederick I. Richman Professor of Law, Stanford Law School; David Cole, Professor of Law, Georgetown University Law Center; Ronald Dworkin, Frank Henry Sommer Professor, New York University Law School; Frank I. Michelman, Robert Walmsley University Professor, Harvard Law School; Martha Minow, Jeremiah Smith, Jr. Professor of Law, Harvard Law School; Judith Resnik, Arthur Liman Professor of Law, Yale Law School; William S. Sessions, Former Director, FBI, 1987-1993, Former United States District Judge, Western District of Texas, 1974-1987, Chief Judge, 1981-1987; Geoffrey R. Stone, Harry Kalven, Jr. Distinguished Service Professor of Law and Former Dean, University of Chicago Law School, Former Provost of the University of Chicago.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

## REASONS FOR GRANTING THE WRIT

*Amici* agree with Petitioners that the decisions below present constitutional questions of such exceptional importance that they warrant this Court's plenary consideration through certiorari before judgment. *See* Pet. at 7-11.[2] The Great Writ of Habeas Corpus has been fundamental to the Nation's constitutional tradition since the Founding, particularly for persons like Petitioners who face criminal process. The courts below incorrectly reconciled the Military Commissions Act ("MCA") with the Suspension Clause only by treating Petitioners as strangers to the Writ.

This was error, assuming that the habeas rights protected by the Suspension Clause are those originally defined by common law. The courts below treated habeas rights as limited by territorial boundaries and citizen status. The Writ, however, has long reached beyond sovereign soil to territory within the sovereign's practical control, particularly to fill a legal vacuum that would otherwise exist. The Writ has likewise reached aliens as well as citizens. The only categorical exception to the Writ that the Framers might have known was for nationals of avowed enemy nations captured in the battlefield during war, an exception not applicable here.

Even if the scope of habeas is defined by statute, the Suspension Clause prevents Congress from categorically excluding particular territories or classes of persons from habeas review, as previously conferred by statute, without satisfying constitutional strictures. Because Petitioners' pending petitions fell within preexisting habeas jurisdiction, *see Rasul v. Bush*, 542 U.S. 466, 483 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006), Congress may not cancel that juris-

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[2] *Amici* likewise agree that certiorari is warranted, for related reasons, in *Boumediene, et al., v. Bush* (No. 06-1195), and *Al-Odah, et al., v. Bush* (No. 06-1196).

diction without satisfying the Suspension Clause. Finally, the MCA raises serious questions under the Exceptions Clause of Article III, because it imperils this Court's "essential functions" in construing substantive rights in a class of cases already pending in federal court.

## I. THE GREAT WRIT WAS UNDERSTOOD AT THE FOUNDING TO ENCOMPASS NONENEMY ALIENS, EVEN IF DETAINED EXTRATERRITORIALLY

It is well established that the Suspension Clause protects habeas corpus *at least* as far as the Writ extended in 1789. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.).[3] Alien detainees in Petitioners' position were within the scope of the common-law Writ. Neither Petitioners' noncitizen status nor their location at Guantanamo precludes application of the Great Writ the Framers knew.

As this Court has recognized, "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citations omitted). Historical authorities further demonstrate that the Writ ran to proximate territory under the sovereign's exclusive control. Courts were especially solicitous of habeas jurisdiction in

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[3] *See also Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."); *Fay v. Noia*, 372 U.S. 391, 405-06 (1963) (overruled on other grounds); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830) (Marshall, C.J.); William F. Duker, *A Constitutional History of Habeas Corpus* 140 (1980); Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970).

areas where legal vacuums would otherwise exist.[4] The only possible qualification of the Writ's reach was for "enemy aliens," a circumscribed category that is inapplicable here.[5]

Petitioners are nationals of *friendly* nations. They complain that they have been designated and detained as "unlawful enemy combatants" without proper basis. They are being detained indefinitely, outside of hostilities, in a territory subject to the fixed and exclusive control of the United States. They would not have been denied access to the Writ under the common law at the time of the Founding and early Republic, nor should they be now. To expand the category of "enemy aliens" beyond those captured in wars with specified nations, finite in time and space, would be to distend the only exception to which the Writ might historically have admitted.

### A. The Writ Ran Extraterritorially

English courts could issue the Great Writ as far as the outer limit of the Crown's territorial authority, limited only by pragmatic considerations—for instance, whether issuance would interfere with the operation of local courts or entail inordinate travel. Thus, Blackstone described habeas corpus as a "high prerogative writ . . . running into all parts of the King's dominions: for the King is at all times entitled to have an account, why the liberty of any of his subjects is re-

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[4] Notably, England sought to foreclose any such potential vacuum with the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which brought to an end the practice "of taking prisoners outside the jurisdiction to deprive them of the benefit of habeas corpus." R.J. Sharpe, *The Law of Habeas Corpus* 199 (2d ed. 1989).

[5] *See Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("In the primary meaning of the words, . . . an alien enemy is the subject of a foreign state at war with the United States.").

strained, wherever that restraint may be inflicted."[6] Lord Mansfield's account was to the same effect: "There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." *R. v. Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759). Beyond this, Lord Mansfield emphasized the importance of ensuring that no place would be "out of the protection of the law," thereby avoiding "a total failure of trial, and consequently, of justice." *Id.* at 602. In *Cowle*, therefore, Mansfield expressly accounted for the fact that the borough of Berwick, though not part of England, had "no other laws by which it [wa]s governed, but the laws of England." *Id.* at 601. In many other instances, English courts historically issued the Writ beyond England, particularly when no other court had such authority.[7]

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[6] 3 William Blackstone, *Commentaries* *131, *quoted in Leonard Watson's Case*, 112 Eng. Rep. 1389, 1393 (K.B. 1839); *see also* Sharpe, *supra*, at 188.

[7] *See, e.g., R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (providing habeas relief to impressed seaman who had "no other remedy"); *Alder v. Puisy*, 89 Eng. Rep. 10 (K.B. 1671) (issuing writ to Dover, formerly a Cinque Port town); *R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (issuing writ to Channel Island of Jersey); *R. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (same); *Harrison's Case*, *sub nom. Jobson's Case*, 82 Eng. Rep. 325 (K.B. 1626) (issuing writ to Durham, formerly a County Palatine, and noting writs previously issued to Calais and Bordeaux as early as fourteenth century); *Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (issuing writ to Dover because "it is agreeable to all persons and places"); *see also* Sir Matthew Hale, *The History of the Common Law of England* 187, 188 (3d ed. 1739) (stating writ runs to Channel Islands because "the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty" and acknowledging the islands are "Parcel of the Dominion of the Crown of England" but not "parcel of the Realm of England"); *R. v. Suddis*, 102 Eng. Rep. 119, 122 (1801) (granting habeas review to soldier tried by court-martial in Gibraltar).

The common-law Writ ran so far that Parliament was subsequently impelled to restrict it. As nineteenth-century innovations facilitated transportation and communication, the practical reach of the Writ expanded, until, in *Ex parte Anderson*, the Queen's Bench sent the Writ all the way to Canada. 121 Eng. Rep. 525 (1861); *see also* Sharpe, *supra*, at 182. Parliament responded by expressly curtailing the reach of the Writ in the Habeas Corpus Act of 1862, 25 & 26 Vict. c. 20, which then prevented the Writ from issuing "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts" capable of issuing the Writ and effectuating its purpose. The unmistakable implication was that, where foreign courts were *not* competent, English courts could continue to enforce the Writ abroad even under the statute.[8]

### B. The Writ Ran Extraterritorially To Aliens

English courts likewise exercised jurisdiction over extraterritorial injuries to aliens. Exertions of jurisdiction that might not otherwise be appropriate were deemed necessary if no other court was competent to address the injury, even if the complaining party was not a citizen.

The case of *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), is illustrative. There, a "native Minorquin" brought claims of trespass and false imprisonment against the governor of Minorca, "for such injury committed by him in Minorca." *Id.* at 1022. Noting the crime had taken place in a precinct "more immediately under the power of the governor; and that no Judge of the island can exercise jurisdiction there, without a special appointment from him," *id.* at 1027, Lord

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[8] *See* Sharpe, *supra*, at 190 ("[A] case not expressly covered by the Act will fall within the common law rule stated in [*Anderson*]."); *see also Ex parte Brown*, 122 Eng. Rep. 835 (K.B. 1864) (confirming Writ's reach overseas following the 1862 Act).

Mansfield sustained the 3000£ verdict Fabrigas had won from an English jury. *Id.* at 1022, 1032.

Lord Mansfield noted that, if the governor were not accountable in his court, "he is accountable no where." He continued: "[T]o lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained." *Id.* at 1029. Lord Mansfield emphasized the importance of avoiding a legal vacuum, citing several other cases in which "whatever injury had been done . . . would have been altogether without redress, if the objection of locality would have held." *Id.* at 1032. Such reasoning was equally applicable when it came to the Writ, which issued repeatedly on behalf of aliens.[9]

### C. The Only Possible Qualification Of The Writ's Scope Was For Enemy Aliens

Although some qualification of the Writ's scope may have existed for "enemy aliens," that category included at most only nationals of enemy nations captured at war. The Enemy Alien Act of 1798 confirmed this understanding, defining "enemy aliens" as men over the age of fourteen who were citizens of foreign nations or governments with which the United States was at war or with which a conflict was imminent. *See* Act of July 6, 1798 (Enemy Alien Act), ch. 66, § 1, 1 Stat. 577, 577. Even those designated enemy aliens, however, retained habeas corpus rights to challenge their enemy designation. *See Lockington's Case* (Pa. 1813)

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[9] *See Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810); *Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (1779); *Somerset v. Stewart (Somerset's Case)*, 98 Eng. Rep. 499 (K.B. 1772); *Case of Du Castro*, 92 Eng. Rep. 816 (K.B. 1695).

(Tilghman, C.J.), *reprinted in* 5 Am. L.J. 92 (1814) (extending habeas to British merchant detained during War of 1812), *aff'd*, 5 Am. L.J. 301 (1814).

### D. The Colonies Imported The Writ As Broadly Defined At Common Law

By 1776, the American colonies universally employed the Great Writ, as they knew it under the common law, to safeguard personal liberty.[10] For example, as events in the colonies accelerated towards the Declaration of Independence, a delegation approached the inhabitants of Quebec to explore possible alliance. *See* 1 *Journals of the Continental Congress, 1774-1789*, at 105-08 (Worthington Chauncey Ford ed., 1904). The invitation to independence included a description of five "invaluable rights" of the colonies' governments, among which was habeas corpus. *Id.* at 107-08.

In 1777, Pennsylvania Chief Justice Thomas McKean defended his decision to issue the Writ on behalf of twenty dissidents by similarly noting that the habeas corpus act had always been "justly esteemed the palladium of liberty" and was part of the laws of Pennsylvania.[11] Indeed, the Writ remained available as the Revolution progressed.[12]

In 1786, a committee of the Continental Congress recommended additional Articles of Confederation requiring that "trial of the fact by Jury shall ever be held sacred, and also the benefits of the writ of Habeas Corpus." 31 *Journals*

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[10] *See* Duker, *supra* note 3, at 115 (noting availability of Writ in all thirteen colonies and incorporation of procedural reforms of 1679 act in Virginia, North Carolina, South Carolina, and Georgia).

[11] Letter from Thomas McKean to John Adams (Sept. 19, 1777), *in* 5 *Papers of John Adams* 289 (Robert J. Taylor et al. eds., 1983).

[12] *See, e.g.*, Letter from Thomas McKean to William Atlee (June 12, 1780), *in* 15 *Letters of Delegates to Congress* 305 (Paul H. Smith ed., 1976) (noting availability of Writ).

*of the Continental Congress, 1774-1789*, at 497-98 (Roscoe R. Hill ed., 1936). Similarly, the 1787 Ordinance for the government of the territory North West of the river Ohio stipulated: "The Inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by Jury; . . . and of judicial proceedings according to the course of the common law . . . ." 32 *Journals of the Continental Congress, 1774-1789*, at 340.

This understanding of the Writ carried into the framing of the Constitution. In debates over the Suspension Clause, the only question was whether the Writ should be inviolable or subject to limited suspension. Of the few comments on the subject, the most noteworthy came from James Wilson of Pennsylvania, who "doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 541 (Ohio Univ. Press 1966). Others advocated limiting the period of any suspension to one year. *See id.* Significantly, there was no discussion of the scope of habeas jurisdiction, presumably because the Framers presupposed the availability of the Writ known at common law.[13] Certainly the Framers presupposed the general availability of habeas to aliens, for they contemplated limited occasion for

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[13] The constitutional presupposition of the Great Writ as it existed at common law is no less reflected in the Suspension Clause than the presupposition of state sovereignty is in the Eleventh Amendment. *See, e.g.*, Badshah K. Mian, *American Habeas Corpus: Law, History, and Politics* 188 (1984) ("The prohibition contained in [the Suspension Clause] presupposed the jurisdiction of the federal courts to issue the writ."); *see also* Declaration of the Delegates of New York State, July 26, 1788, in 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (Jonathan Elliot ed., 2d ed. 1876); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 498-99 (2007).

suspending habeas specifically in the face of "*Invasion*" (as well as "Rebellion"), thereby bespeaking a concern with foreign "Invaders," who stood to be distinguished from aliens otherwise entitled to petition.

### E. The First Judiciary Act Of 1789 Confirmed The Broad Scope Of The Writ

The First Congress, familiar with common-law authorities and consisting largely of those who had drafted and ratified the Constitution, gave expansive reach to habeas in the Judiciary Act of 1789.[14] The prescription of habeas jurisdiction in Section 14 of the Act spoke in broad terms, not limited by territory or citizenship. It is especially noteworthy that habeas jurisdiction thereby transcended United States territory, transcended United States citizenship, and extended even to those prisoners detained simply "by colour of the authority of the United States."[15] Judiciary Act of 1789 (First Judiciary Act), ch. 20, § 14, 1 Stat. 73, 81-82.

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[14] This Court has often looked to the First Judiciary Act as illuminating the original meaning of the Constitution and the Writ in particular, as understood by the Framers themselves. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 663 (1996); *Faretta v. California*, 422 U.S. 806, 812, 831 (1975); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899).

[15] The full text of Section 14 of the First Judiciary Act reads:

> *And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. — —*Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of

The Act placed no territorial limit on the Writ. Indeed, the only phrase that might connote any geographical constraint, "necessary for the exercise of their respective jurisdictions," was held inapplicable to the first part of the clause, which is what enables habeas jurisdiction. *See Ex parte Bollman*, 4 Cranch at 99 (Marshall, C.J.).

Congress likewise used broad language encompassing aliens alongside citizens. Specifically, Congress extended the Writ to *all* "prisoners." Act of 1789, § 14. This is particularly telling given that the Act elsewhere singled out "aliens" for differential treatment. *See, e.g., id.* at §§ 9, 11, 12, 13; *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (applying Equal Protection Clause protections to aliens, reasoning that the term "person" in the Fourteenth Amendment "is not confined to the protection of citizens").

The absence of any debate over this jurisdiction confirms that the First Congress was codifying widely accepted common law notions about the broad scope of the Writ. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95 (1923) (noting only one minor change relating to writs of *scire facias* to the text of section 14 of the Act before passage).

### F. Early National Practice Confirmed The Broad Scope Of The Writ

Finally, the practice of early federal courts confirmed that the broad scope of the Writ had carried forward from the common law. In the House debates of 1807, in response to the detention in New Orleans of Eric Bollman and others and their transportation to Washington, D.C. for trial, Representative John Randolph decried that men were being "transported without the color of law, nearly as far as across the Atlantic." 16 *Debates and Proceedings in the Congress of the United*

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the same, or are necessary to be brought into court to testify. First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

*States* 543-44 (J. Gales & W. Seaton eds., 1834). Although the Supreme Court ultimately rectified the unlawful detention in *Ex parte Bollman*, 8 U.S. 75, the underlying events sparked rounds of Congressional debate on the meaning of the Suspension Clause and the possible need for supplemental legislation protecting the Writ.

The same year that *Bollman* was decided, two judges in Pennsylvania invoked the Writ to discharge Hippolite Dumas, a French citizen being detained as a deserter. Noting that Dumas had come to the United States from Jamaica, where he had been stranded, Judges Tilghman and Smith ordered release regardless whether the laws of nations required the United States "to give up generally those seamen, who desert from foreign Ships of War within our Harbours." Tilghman & Smith, *Habeas Corpus Writ, Dumas Case*, 1 Gen. Corresp. Reel 9, James Madison Papers at the Library of Congress (July 20, 1807), *available at* http://hdl.loc.gov/loc.mss/mjm.09_0878_0880.

### G. Guantanamo Is Within The Writ's Historical Reach

Like Gibraltar, Durham, Berwick, the Channel Islands, and other occupied territories to which the Writ historically issued from England, including on behalf of aliens, the United States Naval Base at Guantanamo Bay is territory under the "exclusive jurisdiction and control" of the United States. *Rasul*, 542 U.S. at 476. Absent recourse there to United States courts, there thus would exist a legal vacuum that the common law rightly eschewed.

Guantanamo is a territory defined by the United States' longstanding and exclusive occupation and control, within close proximity to the continental United States. The governing lease is perpetual and entitles the United States to "exercise complete jurisdiction and control" over Guantanamo, even while accepting "the continuance of the ultimate sovereignty of [Cuba] over [the territory]." Lease of Lands for

Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T. S. No. 418; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866. Since 1903, American law has been the only law applied in Guantanamo.[16] Persons at Guantanamo are "amenable only to United States legislative enactments." Marion Emerson Murphy, *The History of Guantanamo Bay*, 8 (U.S. Naval Base, Dist. Publ'ns & Printing Office, Tenth Naval Dist. 1953).[17] Guantanamo is therefore akin to other extraterritorial settings to which the common-law Writ applied.

### H. *Eisentrager* Is Not To The Contrary

Against these consistent lines of English and American authorities pointing to the availability of habeas for designated "unlawful enemy combatants" like Petitioners, the courts below have identified only one authority that supposedly points to the contrary: this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But they misread *Eisentrager* as it applies here.

First, in *Eisentrager*, the prisoners were seized and held in China, a land over which the United States exercised neither jurisdiction nor control, let alone did so to the exclusion of Chinese courts. The United States was permitted to hold a military commission in Chinese territory only with the express and limited consent of the Chinese government. *See Eisentrager*, 339 U.S. at 766. In contrast, Guantanamo has

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[16] *See, e.g., Huerta v. United* States, 548 F.2d 343, 344, 346 (Ct. Claims) (1977) (assuming that a court may judge breach of contract and takings clause claims by Cuban national for loss of property situated on Guantanamo), *cert. denied*, 434 U.S. 828 (1977).

[17] For example, the Office of Legal Counsel opined in 1982 that, because the Guantanamo lease affords the U.S. exclusive jurisdiction over the territory, Guantanamo is subject to the federal Anti-Slot Machine Act. *Installation of Slot Machs. On U.S. Naval Base, Guantanamo Bay*, 6 Op. Off. Legal Counsel 235, 237 (1982).

been within the United States' "exclusive jurisdiction and control" for an extended period of time under the terms of an indefinite lease agreement. *Rasul*, 542 U.S. at 476.

Second, the petitioners in *Eisentrager* qualified as "enemy alien[s]" in the classic sense. *Id.* at 777. In contrast, Petitioners are not "enemy aliens" within the meaning of *Eisentrager*—their nations are not hostile to, let alone at war with, the United States, and their status and affiliation beyond that are very much disputed at the threshold. *Cf. id.* at 771 (noting the impairment of an alien's protection "when his nation takes up arms against us"). Nor are Petitioners engaged in a finite war with any discrete endpoint. *Cf. id.* at 772 (noting that disabilities "are imposed temporarily as an incident of war and not as an alleged incident of alienage").

Third, even in *Eisentrager*, where the prisoners' status as enemy aliens could be taken for granted, this Court noted that layers of judicial review had been expeditiously afforded upon the cessation of hostilities between the United States and Germany. *See id.* at 781. Here, by contrast, more than five years after Petitioners were transported to Guantanamo, Petitioners have not been afforded even a threshold determination by the courts as to the *bona fides* of their detention, nor is any such determination in sight.

Finally, *Eisentrager* was predicated upon an assumption that no longer holds—namely, that affording habeas rights to enemy aliens would afford no reciprocal benefits for our own fighting forces if ever detained. *See id.* at 779. There is every reason to revisit that assumption here. International norms have shifted such that judicial review of detention is widely available around the world.[18] By not offering recip-

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[18] *See, e.g.*, Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. Court. H.R. (Ser. A) No. 8 ¶ 12 (Jan. 30, 1987)); *Askoy v. Turkey*, 23 Eur. H.R 553 ¶ 78 (1996) (Invalidating Turkey's detention of suspected terrorists for more than 14

rocal review of alleged enemy combatants' detention in Guantanamo, the United States is undermining international regard for habeas rights and respect for the rule of law.

## II. CONGRESS MAY NOT CANCEL PREEXISTING STATUTORY ENTITLEMENT TO HABEAS ABSENT A VALID SUSPENSION OF THE WRIT

Even if the Suspension Clause does not codify and guarantee the Framers' understanding of the Writ at common law, then the Clause must at least protect the Writ as Congress has enabled it by statute. Anything less would deprive the Clause of all substantive force. The Petition therefore presents exceptionally important questions warranting this Court's review even if the Constitution is not construed as fixing a bedrock entitlement to habeas. Under the Suspension Clause, U.S. Const. art. I., § 9, cl. 2, Congress may not divest an entire class of persons of habeas rights it has previously conferred unless the Clause has been satisfied. Nor may Congress intrude upon an essential function of this Court under the Exceptions and Regulations Clause, U.S. Const. art III, § 2.

### A. The MCA Exceeds Congress' Power Under The Suspension Clause

To "eliminate the 'Privilege of the Writ' . . . for a certain class or certain classes of individuals" who previously enjoyed it is a "distinct abuse of majority power" that the Framers had in mind when they drafted the Suspension Clause. *St. Cyr*, 533 U.S. at 337-38 (Scalia, J., dissenting). The MCA does just that. This Court has held that Petitioners' pending petitions fell within preexisting statutory habeas jurisdiction. *See Rasul*, 542 U.S. at 483; *see also Hamdan*, 126 S. Ct. at 2769. But the MCA categorically withdraws federal courts' jurisdiction to entertain any habeas petition

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days without bringing them before a court or allowing them to consult with a lawyer.).

from "any alien detained by the United States," including one still awaiting designation as an enemy combatant. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600, 2635-36. This retroactive excision of habeas rights for an entire class of persons is properly viewed as a suspension triggering the strictures of the Suspension Clause.[19]

### B. The MCA Exceeds Congress' Powers Under The Exceptions Clause

While Congress possesses broad power under the Exceptions Clause to dictate the appellate jurisdiction of federal courts, that power is not without limit. Indeed, the very use of the word "exception" in the text of Article III, § 2 implies that the exceptions may not swallow the whole.[20] Neither may Congress use its power under the Exceptions Clause to violate another constitutional provision.[21] Here, the MCA's

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[19] Cases permitting Congress to make certain less categorical modifications or adjustments in statutory habeas are not to the contrary. Those statutory restrictions of habeas that have been upheld have always stopped short of preclusion of the ability to petition itself. *See, e.g., Felker v. Turpin*, 518 U.S. 651 (1996) (permitting termination of this Court's review under AEDPA of circuit courts' "gatekeeping" determinations about the validity of *successive* habeas petitions); *Ex parte McCardle*, 74 U.S. 506 (1868) (dismissing appeal from denial of habeas petition sought under 1867 Act enabling such appeals after 1868 Act revoked that authority).

[20] *See* Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 44 (1981) ("An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite."); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 135 (1981).

[21] *See United States v. Bitty*, 208 U.S. 393, 399-400 (1908) (Holmes, J.) ("What such exceptions and regulations should be it is

jurisdiction stripping specifically violates the Suspension Clause, as explained in Part II.A.

This Court has often acknowledged Professor Henry Hart's thesis that Congress's power under the Exceptions Clause to withdraw jurisdiction does not extend so far as to threaten the "essential functions" of this Court under Article III. Professor Hart expressly included issuing the writ among those "essential" functions. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365.[22] For example, the Court noted that applying the Detainee Treatment Act retroactively could "raise[] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." *Hamdan*, 126 S. Ct. at 2764. And, in *Felker*, this Court held that, because AEDPA did not "repeal [the Court's] authority to entertain a petition for habeas corpus, there c[ould] be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." 518 U.S. at 651. Justice Souter, joined by Justices Stevens and Breyer, concurred separately to note, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question

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for Congress, in its wisdom, to establish, having, of course, due regard to all the provisions of the Constitution.").

[22] Professor Hart's thesis has gathered broad consensus. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan L. Rev. 817, 835 (1994); *Sager, supra*, at 44; Tribe, *supra*, at 135; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 190 U. Pa. L. Rev. 157, 160-167 (1960). For a view that "Article III gives Congress *no ability* to remove the Supreme Court's jurisdiction" see Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L. J. (forthcoming 2007), *available at* http://ssrn.com/abstract=935368.

whether the statute exceeded Congress's Exceptions Clause power would be open." *Id.* at 667 (Souter, J., concurring).

The MCA, by contrast, would strip this Court *entirely* of its ability to review habeas petitions filed by alien detainees, who may await determination and/or adjudication of their status *indefinitely* without recourse to the courts.[23] Interpreted as Respondents urge, the MCA thus would threaten this Court's essential functions. By precluding judicial review of an entire category of cases raising critical questions about ongoing, indefinite detentions outside of the vicinity of armed conflict,[24] Congress improperly eliminated certain "disfavored constitutional claims with deep prejudice to judicially protected rights." Sager, *supra*, at 70.

Nor is the problem cured by judicial review of detainees' final military commission judgments in the D.C. Circuit. Such review is unavailing when a detainee is not brought to trial promptly—or, indeed, at all. The statute expressly precludes raising the very claims based on the Geneva Conventions that this Court previously sustained as to preexisting procedures. MCA § 8(a); MCA § 3, 10 U.S.C. § 948b(g). And no judicial review whatever—even in the D.C. Circuit—is permitted of claims relating to conditions of confinement, including torture or "extraordinary rendition" to countries practicing torture. *See* MCA § 7(a).

The problem is compounded to the extent Congress expressly targeted pending petitions such as Hamdan's that were otherwise ripe for judicial pronouncement. *See Boume-*

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[23] *See* MCA § 7(a) (amending the federal habeas statute to remove the jurisdiction of any "court, judge, or justice" over habeas petitions filed by aliens who are either detained as enemy combatants or are "awaiting such determination").

[24] *See* Ratner, *supra* note 22 at 201 ("[L]egislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment.").

*diene v. Bush*, 476 F.3d 981, 987 n.2 (D.C. Cir. 2007) (recounting statements by members of Congress evidencing an intent to target pending petitions in general and the *Hamdan* case in particular). Congress may not use its Exceptions power "to achieve particular desired answers to questions that fall within the judicial Power of the United States." Claus, *supra*, at 9.

For example, in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court rejected an attempt at jurisdiction stripping as a violation of the Exceptions Clause, reasoning that it amounted to a congressional attempt to "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *Id.* at 146. At issue was Congress's attempt to prevent former Confederate supporters from obtaining benefits previously promised if they accepted a presidential pardon. "[O]f obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980). Here, as in *Klein*, Congress has withdrawn jurisdiction in an attempt to block an unfavorable outcome in pending cases. In so doing, Congress may well have "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

| SALIM AHMED HAMDAN, PETITIONER, | OMAR KHADR, PETITIONER, |
|---|---|
| v. | v. |
| ROBERT GATES, ET AL., RESPONDENTS | GEORGE W. BUSH, ET AL. RESPONDENTS |

*ON PETITION FOR WRIT OF CERTIORARI AND WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## *AMICUS CURIAE* BRIEF OF 422 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 422 United Kingdom and European parliamentarians, including 297 current or former Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, 113 current or former Members of the European Parliament, and a former Vice President of the European Commission (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

*Amici* are drawn from all across Europe, both geographically and politically. The *amicus* group spans the political spectrum, and includes senior figures from all the major political parties in the United Kingdom, including former Cabinet Ministers. The group also includes judges of the highest court in the United Kingdom, senior lawyers, and Bishops of the Church of England.

The same *amicus* group filed briefs in support of Petitioner Hamdan's previous petitions in this Court, when he faced essentially the same "conspiracy" charge (a charge not recognized in the law of war) and the same risk of being subjected to unlawful trial by military commission as he does now. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court upheld Hamdan's claims under the Geneva Conventions and Uniform Code of Military Justice ("UMCJ"). Since then, Congress has enacted the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, section 7 of which the courts below interpreted to require dismissal of Petitioners' habeas petitions.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

As before, *amici* express no view on whether Petitioners have engaged in acts of terrorism or any conduct in violation of the laws of war, international law more generally, or U.S. law. Nor do *amici* seek to express any view on politics or tactics in the "war on terror" in general. These are questions on which *amici* may hold differing individual views.

*Amici* have participated in this case from the outset because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law and, fundamentally, with the rule of law itself. *Amici* have previously taken part in these proceedings to call upon this Court to ensure that the treatment accorded to prisoners such as Petitioners—innocent until proven guilty, be they ultimately found to be terrorists or not—meet these standards. In particular, *amici* have come together to endorse the view that, even in the face of the terrorist threat, law and in particular international law has scope to operate and acts to prevent the existence of legal "black holes" within which individuals are stripped of fundamental legal protections recognized by all civilized nations and enshrined in international humanitarian and human rights law.

*Amici* once again urge this Court to act. *Amici* consider that the provisions of the MCA, such as section 7, which purport to interfere with habeas actions brought by an alien "determined by the United States to have been properly detained as an enemy combatant or...awaiting such determination," fundamentally offend the rule of law and contravene treaties by which the United States is bound and upon which it is built.

The writ of habeas corpus has from the days of King John been fundamental to any valid concept of liberty. It is

the cornerstone of "government of laws and not of men." Building on this ancient foundation, international human rights treaties to which the United States is party enshrine the right of detainees to test the lawfulness of their detention in a court of law. Were the MCA to be found to deny this right to detainees such as Petitioners, this would be incompatible with the rule of law and with the United States' international legal obligations.

Moreover, insulating the military commission process from habeas review, which is the effect of the decisions below, would expose Petitioners to further violations of their human rights and would be inconsistent with the United States' international legal obligations. For a state such as the United States to persist in conduct that defies international law does incalculable violence to the rule of law and to the vitality of international human rights and humanitarian law—binding legal norms that reflect the very principles that differentiate the peoples of civilized nations from those who acquiesce in unlawful acts of terror.

The outcome of this case is of course of enormous personal significance for Petitioners. The rulings of this Court in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), reasserted the rule of law and constrained not the Government's conduct of the war on terror but only its efforts to cast individuals detained at Guantanamo Bay out of the reach of legal protection into a legal "black hole." The MCA and the decisions below threaten to undo that process and to deprive Petitioners and other detainees of that most fundamental touchstone of liberty, the writ of habeas corpus. Absent this touchstone, Petitioners have no means to vindicate their well founded claims that trial by military commission would violate their fundamental rights.

Each member of the *amicus* group has been privileged to serve a state committed to the rule of law, and

each has an interest in seeing the rule of law upheld. Insofar as the provisions of the MCA that purport to insulate the military commissions from habeas review stand, the United States will in effect have declared that the fundamental principle of the rule of law upon which this nation was built is set aside in the face of a terrorist threat. That would bode ill for the future of all liberal democracies and the efforts of the community of liberal democracies to encourage and enforce respect for international human rights and humanitarian norms and the rule of law around the world. Accordingly, *amici* urge this Court, with the eyes of the world now turned toward it, to grant the Petition and affirm that the United States will not sacrifice the integrity of its legal system and the values which it espouses and holds dear to the terrorist threat.

To paraphrase Lord Hoffman's speech in the House of Lords, describing the stark choice the Government of the United Kingdom faced when deciding on rules for the detention of terrorist suspects: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for [this Court] to decide whether to give the terrorists such a victory." *A and Others v. Sec'y of State for the Home Dep't*, [2005] H.L.L.R. 1, 53 (per Lord Hoffman).

## SUMMARY OF ARGUMENT

*Amici* believe that (i) the gravity of the issues involved, issues which concern not only the parties but all nations and most particularly those who share the commitment of the United States to the rule of law and (ii) the need to halt violations of international law by the United

States require that the Petition be granted and the case be heard by this Court on an expedited basis.

## ARGUMENT

### I. The Interests Of All Parties And The Wider World Are Served By An Expeditious And Definitive Resolution Of The Important Questions Presented In This Case.

*Amici* appreciate that the procedure contemplated in the Petition is extraordinary. However, the circumstances of this case and the significance of the legal questions presented are also extraordinary. Without doubt, the matters raised are of imperative public importance and merit immediate determination by this Court.

Granting the Petition at this stage will serve the interests of all parties. Petitioners are crucially concerned with ensuring the legitimacy of any process to which they will be subject. The judgments below effectively deny them any forum in which to do so. In protecting Petitioners from being subject to an unlawful process, time is of the essence, as the Government has indicated that it plans to commence trials before military commissions pursuant to the MCA at the earliest opportunity, which may be as early as late Spring of this year. Unless this Court acts to ensure that Petitioners may be heard, they will face prosecution in a process which both the international community and history may ultimately regard as unjust and unworthy of the United States' long commitment to human rights and the rule of law.

For this reason, the interests of the United States will also be served by this Court granting the Petition: Until Petitioners' challenge to the legality of the military commission process is heard and resolved in regularly constituted courts of law, the legitimacy of that process will

continue to be questioned, as will the commitment of the United States to the rule of law. The decisions below threaten to bar any consideration of Petitioners' well-founded allegations that the military commission process denies them fundamental rights that are secured by, among other things, treaties to which the United States is a party and by which it is bound.

The significance of the issues raised is not restricted to the national level. Habeas corpus and the commitment to the rule of law and fundamental principles of liberty that it reflects are the common heritage of civilized nations. The writ itself pre-existed the United States, and it is embodied in the national law of countless countries and, importantly, in multiple international human rights treaties by which the United States is bound. The Supreme Court of Canada recently reaffirmed the enduring importance of habeas corpus to civilized nations. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, *available at* 2007 Can. Sup. Ct. LEXIS 9. For these reasons, this Court's ruling on the scope of habeas jurisdiction will resound within legal systems worldwide, both national and international. And any deviation from the liberty and rule of law values enshrined in the Great Writ would pose a challenge to efforts by the community of liberal democracies to encourage and enforce commitment to due process and the rule of law around the world.

*Amici* recall that this Court has granted certiorari before judgment in the past where cases of such exceptional importance have come before it. The case for certiorari before judgment is at least as strong, if not stronger, here than it was in *Ex parte Quirin*, 317 U.S. 1, 19 (1942), where this Court granted certiorari before judgment "[i]n view of the public importance of the questions raised...and because in [the Court's] opinion the public interest required that [the Court] consider and decide those questions without any

avoidable delay." This is a case which has serious and urgent implications for Petitioners, the United States and the international community more generally. In light of the extraordinary circumstances of this case and the significance of the legal questions presented, *amici* urge the Court to grant the Petition.

## II. Granting The Petition Is Necessary To Prevent Violations Of International Law.

A further imperative is for the United States to come back into compliance with its binding obligations under international law. The MCA, both in its "jurisdiction-stripping" provisions and its provisions relating to the military commission process, violates international law in that it denies to Petitioners fundamental rights secured by international human rights treaties and Common Article 3 of the Geneva Conventions of 1949, by which the United States is bound. The Court can avoid this violation by granting the Petition and interpreting the MCA consistently with international law, *cf. Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"), or invalidating those aspects of the statute that contravene international law.

### A. Insulating Military Commissions From Habeas Review Itself Violates International Law.

Were the Government to succeed in denying the jurisdiction of the courts even to hear claims concerning the legality of continued detention and the military commission process to which Petitioners are to be subjected, this would directly conflict with the clear and well settled principle of international human rights law, by which the United States is bound, that a detainee has the right to challenge the legality of his detention in court. This Court should grant the Petition

in order to prevent this violation of international law by the United States.

The fundamental right of an individual detained by authority of a state to challenge the legality of his detention is enshrined in numerous instruments of international law that bind the United States, including:

(1) Article 9(4) of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("ICCPR"): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"; and

(2) Article 7(6) of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 ("ACHR"): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

The United States has ratified the ICCPR and is therefore bound by its terms. *See* U.S. CONST. art. VI, cl. 2. Although the United States has not ratified the ACHR, it has signed it and is therefore bound not to defeat its object and purpose and must avoid taking any action that is inconsistent with the rights set out therein. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

The right articulated in article 9(4) of the ICCPR and article 7(6) of the ACHR has its origins in the Anglo-American writ of habeas corpus; these treaty provisions mirror in international law the protections enshrined in national law provisions, including the provisions of article I, section 9, clause 2 of the United States Constitution. The obligation to provide a person deprived of liberty with an

opportunity to challenge the lawfulness of detention (described by scholars of international law as the right of habeas corpus) is also recognized as an aspect of the customary international law of war. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 349-52 (2005).

As such, the right to challenge the legality of detention is one of the most fundamental of the "judicial guarantees which are recognized as indispensable by civilized people" referred to in Common Article 3 of the 1949 Geneva Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135. Indeed, although some of the rights protected by international law may be derogated from in time of war or emergency, international tribunals charged with the application and implementation of international human rights treaties concur that this particular right cannot be made to yield. *See* Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of Jan. 30, 1987; Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of Oct. 6, 1987; Inter-American Court of Human Rights, *Case of Neira Alegria and Others*, Judgment of Sept. 19, 1996 (characterizing the writ of habeas corpus as among those judicial remedies that are "essential" for the protection of fundamental rights that persist in times of war or emergency). *See also* U.N. Human Rights Committee, *General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29 (Aug. 31, 2001) ("[I]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.").

This Court has already recognized that the protections of Common Article 3 apply to Petitioner Hamdan (and others in his position, including Petitioner Khadr). See *Hamdan*, 126 S. Ct. at 2795-96 (concluding that "Common Article 3...is applicable here and...requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'"); *id.* at 2802 (Kennedy, J., concurring) (describing Common Article 3 as "one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan" and observing that this "provision is part of a treaty the United States has ratified and thus accepted as binding law"). The strictures of the ICCPR and the ACHR, as well as customary international law, also oblige the United States to provide Petitioners with means of challenging the legality of their detention.

In the law of the United States, the means by which individuals detained by the power of the state vindicate this right has been through the mechanism of habeas corpus. The District Court found that, pursuant to the MCA, the writ of habeas corpus is not available to Petitioners to challenge the legality of their detention. Accordingly, the effect of the judgments below is to deny Petitioners' fundamental human rights, rights which the United States has pledged itself to uphold and is legally bound to secure. The Court can and should prevent this violation of international law, *cf. The Charming Betsey*, 6 U.S. (2 Cranch) at 118, by granting the Petition and reaffirming the Petitioners' access to the writ of habeas corpus.

### B. Insulating Military Commissions From Habeas Review Would Allow Further Violations Of International Law.

The treatment of Petitioners and others detained at Guantanamo Bay (and elsewhere), to date and under the MCA, deviates from the most basic and fundamental norms of procedural fairness, respect for liberty and due process that are recognized in international law. The Court should grant the Petition in order to enable meaningful judicial scrutiny of the military commission process and to halt these violations.

#### 1. Violation Of Speedy Trial Rights.

Chief among the violations of Petitioners' rights is the denial of a speedy trial to resolve the allegations belatedly made against them. The right to a speedy trial, which is a fundamental component of the right to a fair trial, is enshrined in numerous instruments of international law, including:

(1) Article 9(3) of the ICCPR, which states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release"; and

(2) Article 7(5) of the ACHR, which provides that "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

Accordingly, U.S. courts recognize the right to a speedy trial, as protected by international law. In *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998), citing the Restatement (Third) of the Foreign Relations Law

of the United States and various international instruments, including the ICCPR, the Court of Appeals held that "there is a clear international prohibition against arbitrary arrest and detention", and that "detention is arbitrary 'if ...the person detained is not brought to trial within a reasonable time'." 141 F.3d at 1384; *accord Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

Significantly shorter periods of pre-trial detention than those which Petitioners have endured have been found to violate international law. *See, e.g., Sextus v. Trinidad and Tobago*, H.R.C. Communication No. 818/1998, U.N. Doc. CCPR/C/72/D/818/1998 (July 16, 2001) (holding that a period of twenty-two months' detention violated ICCPR article 9(3)). The United States has not complied with its obligations under the ICCPR or the ACHR by holding Petitioners in pre-trial detention for some five years. And the MCA explicitly denies to Petitioners and other detainees the right to a speedy trial. *See* MCA, *supra*, § 3(a) (disapplying provisions of UCMJ relating to speedy trial to trial by military commission).

It is no answer to say that the military commissions under the MCA will shortly provide the right to a fair trial which has hitherto been denied the Petitioners: the violation of the speedy trial right has already occurred, and indefinite detention without even the prospect of a trial continues for scores, if not hundreds, of individuals detained by the United States. Moreover, the right to a speedy trial is the right to a prompt *and fair* trial, and Petitioners' allegation that the military commission process is unfair is precisely the subject matter of the habeas petitions which the lower courts have dismissed.

### 2. Violations Of Generally Recognized Principles Of Regular Judicial Procedure Secured By Common Article 3.

Petitioners' claims that military commissions will not provide a process that meets basic standards of fairness and due process are well founded. In at least two respects, the military commission process under the MCA will deny Petitioners the "judicial guarantees which are recognized as indispensable by civilized nations" that are required under Common Article 3.

First, the MCA authorizes military commissions to try Petitioners for the charge of "conspiracy," which is not a recognized violation of the law of war, *see Hamdan*, 126 S. Ct. at 2779 (plurality opinion). In construing the reference in Common Article 3 to "judicial guarantees which are recognized as indispensable by civilized nations" this Court has found authoritative guidance in Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3. As was observed in *Hamdan*:

> this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949.... Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."

*Hamdan*, 126 S. Ct. at 2797 (plurality opinion of Stevens, J.) (citation omitted); *see also id.* at 289 (Kennedy, J., concurring) (referring to Article 75). One of these fundamental safeguards is the principle that "No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed." *See* Protocol I, *supra*, art. 75(4)(c). Accordingly, trying Petitioners for conspiracy under an *ex post facto* standard violates the "judicial guarantees" secured by Common Article 3.

Second, the MCA authorizes military commissions to convict Petitioners on the basis of any evidence, even hearsay evidence, that is deemed "reliable" and "probative." Yet Petitioners are not entitled to discover information about the sources of this information or the methods—including cruel, inhuman or degrading treatment just short of torture, which will not result in the exclusion of evidence—by which it was obtained. A similar feature of the military commissions' structure at issue in Hamdan's previous petition to this Court was described by the Court as a "striking feature" of the ways in which the military commission process deviated from normal procedure, *Hamdan*, 126 S. Ct at 2786, and it certainly will materially prejudice Petitioners' ability to defend themselves in military commission proceedings. For this reason, the military commission process fails to "afford the accused before and during his trail all reasonable rights and means of defense," as is required by article 75(4)(a) of Protocol I, and to secure to Petitioners "the right to examine, or have examined, the witnesses against him," recognized in article 75(4)(g) of Protocol I.

For these reasons, the MCA removes the "judicial guarantees which are recognized as indispensable by civilized nations" as is required by Common Article 3, the international legal standard which this Court has already said

applies to their treatment and trial by military commission. In these circumstances, the Court should grant the Petition and keep the doors of the courts open to Petitioners. This is the only way to vindicate the rights guaranteed to Petitioners under international law and the only way to ensure that the military commission process will comply with the United States' international legal obligations.

## CONCLUSION

As the Government of the United States has itself so often stated, the war on terror is an epic struggle between lawless forces who deny our common humanity and who disregard the most basic rules of civilized behavior and the rest of the world—committed to liberty, equality before the law and the rule of law. This struggle surfaces in the "jurisdiction-stripping" provisions of the MCA, and their assault on the rule of law. The Court should grant the Petition in order to continue in the direction it has taken in *Rasul* and *Hamdan*: to prevent the creation of a legal "black hole"; to counter the isolation of individuals detained at Guantanamo Bay, and their treatment, from legal scrutiny; and to ensure that the standards that the United States and its legal system uphold are extended, as they are required under international law to be, to people under the control of the United States. In so doing, the Court can reinforce human rights and the rule of law, ensure compliance with the international legal obligations of the United States, and do great service to the authority of international law generally

and, specifically, to the liberal principles upon which the world's democratic states are founded.

Respectfully submitted,

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March 29, 2007 *Counsel for Amici Curiae*

# APPENDIX

# APPENDIX

## LIST OF AMICI

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